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MILITARY LAW REVIEW

Volume 161 **September 1999**

OPENING THE GATE?: AN ANALYSIS OF MILITARY LAW ENFORCEMENT AUTHORITY OVER CIVILIAN LAWBREAKERS ON AND OFF THE FEDERAL INSTALLATION

MAJOR MATTHEW J. GILLIGAN[1]

Fort Swampy is a large Army installation with exclusive federal jurisdiction. At 2200 one night, military policewoman Sergeant Lisa Smith is driving a police vehicle on traffic patrol when she receives an order to pick up a shoplifter detained at the post exchange by a store detective. Upon arrival, she is shocked to see a man run from the store, grab a woman standing at the gas pumps, violently push the woman into her car, jump into the car with the woman, and speed away. Sergeant Smith pursues the vehicle for two miles at high speeds toward an exit gate that is only open during daytime. Finding the gate closed, the man exits the car, climbs over the gate fence, and runs away. Sergeant Smith quickly ensures the woman is safe, then climbs the fence, draws her 9mm handgun, and pursues the man on foot, chasing him into a crowded trailer park. The man is exhausted, so she gains on him. At thirty feet, he suddenly turns in the darkness, it appears he has a gun. Sergeant Smith fires–bamm, bamm!! The shots miss, but the man hits the ground and gives up. As reinforcements arrive, Sergeant Smith handcuffs

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the man and instructs another military police officer (MP to transport him to the MP station.

I. Introduction

Sergeant Smith has saved the day, apprehending a dangerous felon. But what exactly are the limits of her authority? Can she legally exercise her military law enforcement authority outside the gates?

This article examines the authority that military law enforcement officials[2] may exercise over civilian lawbreakers. Specifically, the article seeks to clarify the legal bases for the assertion of military police power over civilians in various contexts–both on and off the federal military installation.[3] The focus is on the exertion of authority at the *initiative* of

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2. Military law enforcement officials include both military service members assigned to such duties and civilians hired by the military departments to perform law enforcement duties. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 302(b)(1) (1998) [hereinafter MCM] (defining military law enforcement officials as "security police, military police, master at arms personnel, members of the shore patrol, and persons designated by proper authorities to perform military criminal investigative, guard, or police duties, whether subject to the code or not . . ."). Civilians contracted by or hired by the military departments as guards or police have the same basic law enforcement authority, including the power to apprehend persons subject to the code, as active duty military law enforcement. *See* MCM, *supra*, R.C.M. 302 analysis, app. 21, at A21-13; *see also* Police Powers: Contract Guards Have Same Authority as Security Police, Op. JAG, Air Force, No. 65 (10 July 1980) (opining that civilian contract guards, as agents of the installation commander, have the same law enforcement authority, including the use of force, as military security police); Civilian Police/Guard Authority and Liability, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 1979/3255, para. 1.b. (14 Sept. 1979) (opining that Army civilian law enforcement personnel and guards, through the authority of the installation commander, may apprehend and detain civilians for offenses committed on the installation); Telephone Interview with John J. Perryman, III, Special Agent, Office of the Inspector General, Department of Defense, Criminal and Investigative Police and Oversight Division (Jan. 19, 1999) (stating that, under Department of Defense policy, civilian law enforcement officials derive the same authority from the commander as service members performing law enforcement duties).

3. The scope of this article is limited to the authority of military law enforcement authorities within the continental United States. The authority of these officials overseas will vary between countries and will likely differ from their authority within the continental United States. The law of the host nation may affect their authority over both service members and, in particular, civilians. An international agreement–such as a status of forces agreement–may provide guidelines for the execution of military law enforcement duties. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 190-30, MILITARY POLICE INVESTIGATIONS, para. 4-2 (1 June 1978) [hereinafter AR 190-30] ("In overseas areas, off-post incidents will be investigated in accordance with Status of Forces Agreements and/or other appropriate United States-host country agreements.").

military officials, and not at the request of, or in cooperation with, civil authorities.[4]

The primary focus of this article is to study the power of military officials to conduct warrantless *arrests* of civilians.[5] The decision to arrest is a critical stage in the assertion of police authority, and is perhaps the most intrusive of all governmental powers. An illegal arrest may violate the Fourth Amendment's guarantee to be free from unreasonable seizures;[6] evidence seized incident to (weapons, contraband) or resulting from (confessions, identifications) an illegal arrest will be suppressed by courts as "fruit of the poisonous tree."[7] In particularly egregious cases, an illegal arrest may warrant a civil tort action.[8] The authority to arrest is thus an extraordinary power, the abuse of which raises grave concerns. Accordingly, this article provides military law enforcement officials and the attorneys who advise them with clear guidelines on the authority to arrest a civilian.

Section II reviews the legal limitations to military authority over civilians, including the lack of federal statutory arrest authority, and the specific limitation of the Posse Comitatus Act,[9] which generally prohibits military assistance to civil authorities in enforcing civil laws.[10] Section III reviews the principle legal basis for the assertion of military law enforcement authority over civilians: the inherent authority and responsibility of the installation commander to maintain law and order and protect the inhabitants of the installation.[11] Section III also reviews the principle exception to the Posse Comitatus Act allowing for this exercise of military police power: the Military Purpose Doctrine, which permits actions taken for the primary purpose of furthering a military function, regardless of the incidental benefits to civil authorities. This article analyzes the Military Purpose Doctrine in the context of both on- and off-post applications of authority.

Finally, Section IV studies two likely off-post scenarios where military law enforcement officials will need to make instantaneous decisions

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4. This article concerns only those cases in which military law enforcement officials take the initiative to assert their authority over civilians. For example, a military policeman observes a civilian driving while intoxicated, and on his own initiative, he pursues the civilian and detains him. This article does not address those circumstances in which *civilian authorities request assistance* to enforce civil laws–such as to quell a riot. There are various federal statutes that authorize military assistance to civil authorities when requested. *See infra* Section II.B for a listing of various exceptions to the Posse Comitatus Act allowing military support in response to specific requests for assistance.

about the extent of their authority: (1) a civilian lawbreaker, being followed in "hot pursuit," crosses *outside* the boundary of federal jurisdiction; and (2) a military official, within a close response range, personally

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5. The term "arrest" in this article is the commonly used, conventional civilian term developed in the common law. Through a series of Fourth Amendment cases, the United States Supreme Court has attempted to define arrest. *See*, e.g., Florida v. Royer, 460 U.S. 491 (1983). In its basic form, "arrest occurs when a person's liberty has been restricted by law enforcement officers to the extent that he is not free to leave at his own volition." CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE § 3.02. (1986). Not all restrictions of one's freedom of movement will rise to an arrest; it depends on the totality of the circumstances. *See id.*

It is important at this point in the article to clarify that the conventional civilian term "arrest" will be used because the common law of arrest applies when civilians are detained by military law enforcement authorities and eventually prosecuted in civilian state or federal courts. For military justice practitioners, there is often confusion in the use of such terms as "apprehension" and "arrest." The military term "apprehension" is the equivalent of "arrest" in civilian terminology. MCM, *supra* note 2, R.C.M. 302 discussion; *see also id.* R.C.M. 302 analysis, app. 21, at A21-13 ("The peculiar military term "apprehension" is statutory (Article 7(a)) and cannot be abandoned in favor of the more conventional civilian term, "arrest."). The characteristics of the military term "apprehension" are the same as the civilian term "arrest." In the context of military justice, an "apprehension" may be performed by law enforcement or certain non-law enforcement personnel. The apprehension must be based on probable cause, and the custody–the exercise of government control over the person's freedom of movement–may continue until proper authorities are notified and pretrial restraint or confinement is ordered. *Id.* R.C.M. 302 discussion. As with the civilian "arrest," a lawful apprehension justifies an extensive search "incident to the apprehension." *Id.*

Some military legal advisors add to the confusion with the term "detention." Because military law enforcement officials do not have statutory arrest power over civilians, *see infra* Section II.A, these advisors are careful to avoid the assertion that military officials may "arrest" civilians. For example, the Air Force Judge Advocate General states that Air Force security police may not "apprehend (in the sense of making an arrest) a civilian . . . who commits a state crime on an Air Force installation." Military Detention of Civilians for Certain Offenses Committed Within an Air Force Installation, Op. JAG, Air Force, No. 60 (3 Oct. 1991). The Air Force then states that military authorities may "*detain* civilians for alleged violations of law on the installation if they have probable cause." *Id.* (emphasis added). Such civilians may be detained for a "reasonable period of time to carry out administrative action or until appropriate civil officials arrive, . . . or until they can be delivered into the custody of the appropriate civilian authority." *Id.* The Air Force chooses the term "detention" to avoid the appearance of claiming a right to conduct arrests. But the actions described are nonetheless within the meaning of "arrest" in Fourth Amendment terms: based on "probable cause," detained for a "reasonable period," held until "delivered to civil authorities," etc. Furthermore, the term "detention" is actually intended to be a far less intrusive exertion of authority than the Air Force describes. Generally, detention may be made on less than probable cause, and involves merely a short period of custody, long enough to determine if criminal activity has occurred. MCM, *supra note* 2, R.C.M. 302 discussion.

This article seeks to clarify some of the confusion. Sections III & IV demonstrate how military law enforcement officials, despite not having specific statutory authority, may in fact conduct "arrests" of civilians pursuant to other legal theories developed in the common law. The reader must recognize, however, that for purposes of this article, the term "arrest" is the general term defined through Fourth Amendment case law, and essentially means the deprivation of a suspect's liberty to the extent that the suspect is not free to leave at his own volition.

observes–or is requested to respond to–a crime in progress *off* the installation.[12] In determining the legal bases for military officials to exert authority in these scenarios, Section IV reviews not only the commander's inherent authority and the Military Purpose Doctrine, but other theories as well, including "citizen's arrest" authority and the common law doctrine of extraterritorial authority to arrest when in "hot pursuit."

II. Limiting the Role of the Military in Civil Law Enforcement

A firmly rooted constitutional principle of American government is that the federal armed forces shall be subordinate to civil authorities.[13] Perhaps nowhere is this principle more sacred than in the context of law enforcement, where there exists an historic tradition of strictly limiting direct military involvement in civilian law enforcement activities.[14]

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6. Arrests are analyzed under the Fourth Amendment of the U.S. Constitution, which provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ." U.S. CONST. amend. IV.

7. WHITEBREAD & SLOBOGIN, *supra* note 5, § 3.01.

8. *Id.*

9. 18 U.S.C.A. § 1385 (West 1998).

10. *See infra* Section II.

11. *See infra* Section III.

12. *See infra* Section IV.

13. *See* U.S. CONST. art I, § 8, cl. 11-12 (establishing Congressional powers over military); *id.* art II, § 2, cl. 1 (establishing Presidential powers as Commander-in-Chief); 9 Op. Att'y Gen. 516, 522 (1860) ("[M]ilitary power must be kept in strict subordination to the civil authority, since it is only in aid of the latter that the former can act at all."); *see generally* ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-221, LAW OF MILITARY INSTALLATIONS DESKBOOK, para. 3-1 (Sept. 1996) [hereinafter JA-221] (describing the constitutional and historical tradition of restricting the military's role in civilian law enforcement).

14. *See* Brian L. Porto, Annotation, *Construction and Application of Posse Comitatus Act, and Similar Predecessor Provisions, Restricting Use of United States Army and Air Force to Execute Laws*, 141 A.L.R. FED. 271 (1997) (discussing historical tradition of limiting military involvement in civil law enforcement, and stating that the underlying objective has been the "recognition of the danger inherent in using military personnel to enforce civil law, namely, that military personnel are trained to act in circumstances in which defeat of the enemy, not protection of constitutional freedoms, is their paramount concern"); *see also* U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, para. 4 (15 Jan. 1986) [hereinafter DOD DIR. 5525.5] (recognizing historic tradition of limiting military involvement in civil law enforcement).

While there have been, and will continue to be, instances when military authorities are lawfully employed to assist civil authorities,[15] the primary responsibility for maintaining law and order in the civilian community is vested in state and local governments.[16] There are, of course, certain federal agencies–but not the Department of Defense–that are granted statutory law enforcement authority over civilians who violate federal penal statutes.[17]

This section reviews the two primary limitations on the exercise of military law enforcement authority over civilians: (1) the lack of congressionally granted statutory authority to arrest; and (2) the Posse Comitatus Act. The first limitation reflects Congress's determination that the military has no active role in civil law enforcement. As this article demonstrates, however, the military inevitably must assert some law enforcement authority over civilians–as a minimum, military commanders have the inherent authority *and duty* to maintain law and order on military installations and to guarantee the security of the occupants thereon. The second limitation, therefore, is an affirmative effort by Congress–via a criminal prohibition–to ensure that, beyond these limited authorized uses, the military is never deliberately used as an active police power over the civilian populace.

A. No Statutory Authority for Military Law Enforcement Officials to Arrest Civilians

The military lacks statutory formal arrest authority over civilians. "Formal arrest" means the authority to take a lawbreaker into physical custody for the purpose of exercising criminal jurisdiction over him.[18] For federal officials, the authority to conduct a formal arrest requires an affirmative statutory grant of power by Congress.[19] Arrests that are conducted

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15. *See* Porto, *supra* note 14, at 280-87 (reviewing circumstances when military forces have been employed to enforce civil laws in the past, and describing exceptions to the Posse Comitatus Act that permit their employment today).

16. For the Department of Defense's acknowledgment of this principle, *see* U.S. DEP'T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES, para. D.1.c (4 Feb. 1994); *see generally* JA-221, *supra* note 13, para. 3-1.

17. Some federal agencies have broad statutory powers to enforce federal law and arrest persons for violations. Federal Bureau of Investigation agents, 18 U.S.C.A. § 3052 (West 1998), United States Marshals, 18 U.S.C.A. § 3053, and Secret Service agents, 18 U.S.C.A. § 3056, may arrest persons for any federal offenses committed in their presence and for "any felony cognizable under the laws of the United States" if based on probable cause. *Id.* This authority extends over state territories as well as federal territories.

without such authority are unlawful and invalid, unless they are upheld under common law doctrines or other authority.[20]

Several federal agencies, such as the Federal Bureau of Investigation,[21] the U.S. Marshals,[22] and the Secret Service,[23] have broad statutory authority to arrest persons for violations of federal law.[24] Military law enforcement authorities, however, do not possess statutory arrest authority over civilians.[25]

Congress has specifically granted to military law enforcement officials statutory arrest authority over service members for violations of the Uniform Code of Military Justice.[26] This authority applies worldwide.[27] But, while the grant of authority does not *prohibit civilian arrests*, it does not specifically provide for such powers.[28]

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18. As an example, law enforcement agents of the United States Forest Service have "authority to make arrests for the violation of the laws and regulations relating to the national forests, and any person so arrested shall be taken before the nearest United States Magistrate, within whose jurisdiction the forest is located, for trial." 16 U.S.C.A. § 559 (West 1998).

19. United States v. Moderacki, 280 F. Supp. 633, 637 (D. Del. 1968) ("The validity of an arrest by a federal official is tested by federal statutory laws.").

20. Bissonette v. Haig, 800 F.2d 812, 816 (8th Cir. 1986), *aff'd*, 485 U.S. 264 (1988). When an arrest is held unlawful, evidence seized incident to the arrest may be suppressed under the exclusionary rule. *Id.*; *Moderacki*, 280 F. Supp. at 639.

21. 18 U.S.C.A. § 3052.

22. *Id.* § 3053.

23. *Id.* § 3056.

24. These federal agencies have broad statutory powers to arrest persons for violations of federal law. Officials may apprehend persons for any federal offense committed in their presence and for "any felony cognizable under the laws of the United States" if based on probable cause. *Id.* §§ 3052, 3053, 3056. This authority extends over state territories as well as federal territories.

25. *See* UCMJ art. 7(b) (West 1998) (limiting grant of authority to arrest to "persons subject to" the UCMJ); *see also* Military Police Authority, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 1984/2412, para. 2 (3 Aug. 1984) ("[M]ilitary police have not been given express statutory authority by Congress to arrest civilian lawbreakers at military installations."). Not all federal agencies are determined to have a "need" for formal arrest authority. The United States Attorney General has established guidelines for analyzing legislative proposals to expand federal agency criminal law enforcement authority. These guidelines list various factors that Congress and agencies must consider. Memorandum from the Attorney General of the United States to the Heads of Executive Departments and Agencies, subject: Guidelines for Legislation Involving Federal Criminal Law Enforcement Authority (June 29, 1984) (on file with author).

Because they lack statutory formal arrest powers over civilians, military law enforcement officials must rely on other bases of legal authority to arrest civilian lawbreakers. Determining these "other bases of legal authority" is the crux of this article. As will be revealed, under such generally accepted common law bases as the installation commander's inherent authority to maintain law and order and protect the installation, the doctrine of extraterritorial authority to arrest when in "hot pursuit," and "citizen's arrest" authority, military law enforcement officials do in fact possess arrest authority in many circumstances. These bases will be explored in Sections III and IV.

B. The Posse Comitatus Act

As stated above, the lack of statutory authority requires military law enforcement officials to rely on other legal bases to assert police power over civilians. But even where the common law permits the military to act, an additional hurdle must always be crossed: the Posse Comitatus Act. The Posse Comitatus Act is the primary restriction on the use of military personnel in civilian law enforcement activities. The Act prohibits using military personnel[29] to execute civil laws unless authorized by the Constitution or an Act of Congress:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.[30]

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26. UCMJ art. 7(b) (granting apprehension authority–the military term for "arrest"–to any person "authorized under regulations governing the armed forces to apprehend persons subject to" the UCMJ when based on probable cause). As an example of an implementing regulation, *see* U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES, para. 3-21 (30 Oct. 1985) [hereinafter AR 195-2] ("[S]pecial agents are authorized to apprehend any person subject to the UCMJ, regardless of location, if there is probable cause to believe that person has committed a criminal offense.").

27. UCMJ art. 5.

28. In *United States v. Moderacki*, the Delaware District Court reviewed the statute defining the powers of postal inspectors, 39 U.S.C. § 3523, and found that it neither authorized nor proscribed arrests without a warrant. 280 F. Supp. 633, 637 (D. Del. 1968). The court held that "where there is no *affirmative* statutory power to arrest without a warrant, Congress has not granted the power." *Id.* (emphasis added).

In 1981, Congress enacted legislation to help clarify the types of support military forces may provide to civil law enforcement agencies without violating the Act.[31] The fundamental limitation described by this legislation is that military members[32] may not "directly participate" in civil law enforcement operations.[33] Direct participation includes search and seizure, arrest, and other similar activities.[34] The Department of Defense has implemented this legislation with *Department of Defense Directive*

29. While the Posse Comitatus Act specifically refers only to the Army and Air Force, its restrictions apply to the Navy and Marines as well. Through legislation enacted in 1981, Congress instructed the Secretary of Defense to prescribe regulations to ensure that all services, including the Navy and Marines, do not directly participate in civilian law enforcement activities, except where authorized by law. 10 U.S.C.A. § 375 (West 1998). The implementing DOD Directive, which defines those activities that violate the Posse Comitatus Act, pertains to all military departments. *See* DOD DIR. 5525.5, *supra* note 14, para. 2.1. The Navy has implemented the DOD Directive with Secretary of the Navy Instruction 5820.7B, which states that "although the use of the Navy and Marine Corps as a posse comitatus is not criminal under the Posse Comitatus Act, such use is prohibited . . . as a matter of Department of Defense policy." U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5820.7B, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, para. 9 (28 Mar. 1998) [hereinafter SECNAVINSTR. 5820.7B]. In *United States v. Walden*, the Fourth Circuit held that the Act does apply to the Navy and Marines. 490 F.2d 372 (4th Cir.). Some courts, however, have declined to apply the Act to the Navy and Marines. *See generally* Porto, *supra* note 14, at 295-98 (listing federal and state cases where courts refused to apply the Act to the Navy and Marines).

30. 18 U.S.C.A. § 1385 (West 1998). The phrase "posse comitatus" means "power of the county" and historically refers to the "population of the county above the age of fifteen, which a sheriff may summon to his assistance in certain cases, as an aid to him in keeping the peace or pursuing and arresting felons." BLACKS LAW DICTIONARY 1162 (6th ed. 1991). The Act was enacted following the post-Civil War Reconstruction Period, during which military forces were used to quell domestic disturbances, arrest Ku Klux Klan members, control labor unrest, and guard election polls. *See generally* Porto, *supra* note 14, at 280-82. At the end of the Reconstruction Period in 1877, Congress enacted the Act to stop the use of military forces to aid civil authorities in law enforcement. *Id.*

31. 10 U.S.C.A. §§ 371-378 (West 1998).

32. The Posse Comitatus Act also applies to federally employed civilian police and security guards performing such duties for a military commander. *See* DEP'T OF ARMY, REG. 190-56, THE ARMY CIVILIAN POLICE AND SECURITY GUARD PROGRAM, para. 5-2 (21 June 1995) [hereinafter AR 190-56] ("Civilian police and security guard personnel, while on duty at an installation, are considered part of the Army, and are therefore subject to the restrictions on aid to civilian law enforcement imposed by [the Posse Comitatus Act].").

33. 10 U.S.C.A. § 375. This section requires the Secretary of Defense to "prescribe regulations" to ensure any activity performed in conjunction with civil officials does not permit "direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other activity unless participation in such activity . . . is otherwise authorized by law." *Id.*

34. *Id.*

5525.5,[35] and each military department has in turn developed regulations to implement the Directive.[36]

Numerous state and federal courts have interpreted the meaning of the Posse Comitatus Act.[37] In determining what equates to a violation of the Act, courts have generally applied three tests: (1) whether civilian law enforcement officials made "direct active use" of military personnel to execute civil laws; (2) whether the use of military personnel "pervaded the activities" of civil authorities; and (3) whether the military was used so as to subject citizens to the "exercise of military power which was regulatory, proscriptive, or compulsory in nature."[38]

Very infrequently have courts found violations of the Act.[39] A review of the cases indicates that violations have been found when military personnel provided direct support at the request of civilian authorities,[40] or when they traveled off the federal installation and participated directly in enforcing the law over civilians.[41] On the other hand, in cases where mil-

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35. DOD DIR. 5525.5, *supra* note 14 (noting that the current Directive is dated 1986, but that the original Directive was published in 1982). The DOD Directive provides that, except as authorized by other parts of the Directive, the Posse Comitatus Act prohibits the following forms of direct assistance:

> 1. Interdiction of a vehicle, vessel, aircraft, or other similar activity.
> 2. A search or seizure.
> 3. An arrest, apprehension, stop and frisk, or similar activity.
> 4. Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.

Id. para. E4.1.3.

36. *See* DEP'T OF ARMY, REG. 500-51, SUPPORT TO CIVILIAN LAW ENFORCEMENT (1 Aug. 1983) [hereinafter AR 500-51]; SECNAVINSTR. 5820.7B, *supra* note 29; U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 10-801, ASSISTANCE TO CIVILIAN LAW ENFORCEMENT AGENCIES (15 Apr. 1994) [hereinafter AFI 10-801].

37. *See generally* Porto, *supra* note 14, at 271 (listing and analyzing state and federal court decisions pertaining to the Posse Comitatus Act).

38. United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (setting out the three established tests to determine when military involvement constitutes more than just indirect assistance); *see also* United States v. Kahn, 35 F.3d 426, 431 (9th Cir. 1994); United States v. Hartley, 678 F.2d 961, 978 n.24 (11th Cir. 1982).

39. *See generally* Porto, *supra* note 14, at 297-88.

40. *See* United States v. Walden, 490 F.2d 372, 374 (4th Cir.1974) (finding a violation when military investigators, at the request of federal agents, participated in sting operation of illegal firearms operation); Wrynn v. United States, 200 F. Supp. 457, 463-65 (E.D.N.Y. 1961) (finding a violation when military personnel flew helicopter to assist in search of escaped civilian convict).

itary officials have acted in a passive manner while assisting civil authorities, courts have not found violations.[42]

Violations of the Posse Comitatus Act could result in criminal prosecution, but since its enactment, no one has ever been prosecuted for violating the Act. Other adverse consequences, however, may result from violations. In many criminal cases, defendants have argued that a violation renders their arrest unlawful; therefore, evidence seized incident to the arrest must be suppressed under the Exclusionary Rule.[43] A review of the cases, however, reveals no federal cases and only one state case in which the Exclusionary Rule was actually applied.[44] In egregious cases, a violation may warrant a civil claim against the military department or the individual service member.[45] A review of these cases, however, reveals only one federal case in which a court supported a tort claim.[46]

There are various exceptions to the Posse Comitatus Act. Congress has enacted a number of express statutory exceptions that authorize the military to assist officials in executing civil laws–thus permitting direct military involvement in civil law enforcement. For example, military forces may assist civil authorities to quell civil disturbances or insurrections.[47] Another exception, enacted as part of the 1981 amendments to the

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41. *See* State v. Danko, 548 P.2d 819 (Kan. 1976) (finding violation when military policemen, while participating in an off-post "joint patrol" with civil authorities, directly participated in the search of a vehicle); Taylor v. State, 645 P.2d 522 (Okla. Ct. App. 1982) (finding violation when military investigator actively participated–including drawing his weapon–in an off-post arrest).

42. *See, e.g.*, United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988) (finding no violation where military investigator, while working undercover to identify sources providing drugs to soldiers, bought cocaine from the defendant and then turned the evidence over to civilian authorities).

43. *See* Major Timothy Saviano, International and Operational Law Note, *The Exclusionary Rule's Applicability to Violations of the Posse Comitatus Act*, ARMY LAW., July 1995, at 61.

44. Taylor v. State, 645 P.2d 522 (Okla. Ct. App. 1982) (holding that military investigator's conduct, which included drawing his weapon to effect an off-post arrest, was so excessive that the exclusion of evidence, tainted by the unlawful arrest, was warranted in this case). For an analysis of the case, *see* Saviano, *supra* note 43, at 64.

45. *See* Major Christopher O'Brien, International and Operational Law Note, *Civil Liability Under the Posse Comitatus Act*, ARMY LAW., July 1995, at 65.

46. Bissonette v. Haig, 800 F.2d 812 (8th Cir. 1986), *aff'd*, 485 U.S. 264 (1988) (holding that an arrest made in violation of the Posse Comitatus Act could be considered in determining the reasonableness of a seizure, and thus a claim of statutory violation was sufficient to state constitutional tort claim for violation of Fourth Amendment rights). For an analysis of the case, *see* O'Brien, *supra* note 45.

Act, is the authority to furnish equipment and personnel to assist civil authorities in enforcing drug, immigration, and tariff laws.[48]

There are also two constitutional exceptions, based on the legal right of the United States to guarantee the "preservation of public order and the carrying out of governmental operations . . . , by force if necessary."[49] First, the "emergency authority" permits the use of armed forces to enforce civil laws to "prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden . . . civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal governmental functions," and local and state authorities are unable to adequately respond.[50] Second, the "protection of federal property and functions" exception allows the use of armed forces to protect federal property and functions "when the need for protection exists and . . . local authorities are unable or decline to provide adequate protection."[51]

Finally, there are two "common law" exceptions. The first holds that no violation occurs when a service member assists civil law enforcement on his own initiative as a private citizen.[52] Second is the Military Purpose Doctrine which holds that no violation occurs when military personnel assist in civil law enforcement to achieve a military purpose and only incidentally benefit civil authorities.[53]

The next section more closely examines one of these exceptions, the Military Purpose Doctrine. Specifically, the next section reviews the extent to which the Military Purpose Doctrine exception permits military law enforcement officials to arrest civilians when these officials are acting pursuant to the inherent authority of their commander.

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47. *See* 10 U.S.C.A. §§ 331-333 (West 1998).

48. *See id.* §§ 371-380. For a complete list of statutory exceptions, *see* DOD DIR. 5525.5, *supra* note 14.

49. Employment of Military Resources in the Event of Civil Disturbances, 32 C.F.R. § 215.4c(1) (1998).

50. *Id.* § 215.4c(1)(i). This exception applies only in extraordinary circumstances. Some examples include: "sudden and unexpected invasions or civil disturbances, including civil disturbances incident to earthquake, fire, flood, or other public calamity endangering life or federal property or disrupting federal functions or the normal processes of government." JA 221, *supra* note 13, para. 3-9. Furthermore, federal forces may not respond unless "duly constituted local authorities are unable to control the situation." AR 500-51, *supra* note 36, para. 3-4b(1).

III. Permissible Exertion of Authority: The Military Purpose Doctrine and the Inherent Authority of the Installation Commander

The primary legal basis for the exertion of military law enforcement authority over civilians is derived from the power of the installation commander.[54] Charged with the responsibility to maintain law and order on the installation, the commander has inherent authority over civilians who threaten the security of the installation and the safety of its occupants. As the commander's agents, therefore, military law enforcement officials may arrest civilian lawbreakers that threaten the installation. Such actions, however, may appear to violate the Possse Comitatus Act–unless an exception applies. This section reviews the most significant exception to the Act: the Military Purpose Doctrine. The doctrine will then be applied to the exertion of police power over civilians, pursuant to the commander's inherent authority, in the context of both on- and off-post encounters with civilians.

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51. 32 C.F.R. § 215.4c(1)(ii). The inherent right to protect federal property is derived from the Property Clause of the United States Constitution: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. Pursuant to this power, Congress has enacted statutes requiring the military departments to protect military installations and property. For example, Congress holds the Secretary of the Army responsible for the "functioning and efficiency of the Department of the Army," 10 U.S.C.A. § 3013c(1) (West 1998), and requires him to "issue regulations for the government of his department . . . and the custody, use, and preservation of its property." 5 U.S.C.A. § 301 (West 1998). Federal armed forces will be employed, however, to protect property only in the most extraordinary circumstances. *See* JA 221, *supra* note 13, para. 3-9:

> The right of the United States to protect federal property or functions by intervention with federal military forces is an accepted principle of our government. The right extends to all federal property and functions wherever located. This form of intervention is warranted, however, only where the need for protection exists and local civil authorities cannot or will not give adequate protection.

Id. This restrictive limitation of the application of armed forces to protect federal property is detailed in Army regulations. *See* AR 500-51, *supra* note 36, para. 3-4b(2).

52. *See* Porto, *supra* note 14, at 298-99 (listing cases where soldiers acted on their own initiative and in their private capacities to help civil authorities).

53. *See id.* at 299-305 (listing cases where the Military Purpose Doctrine was applied).

54. *See infra* Section III.A.1 and accompanying notes (describing installation commander's inherent authority).

A. The Military Purpose Doctrine

The Military Purpose Doctrine provides that law enforcement actions that are performed primarily for a military purpose, even when incidentally assisting civil authorities, will not violate the Posse Comitatus Act. The purpose of the Posse Comitatus Act is to limit the direct and active use of the military by civil law enforcement authorities, and to shield civilians from the exercise of regulatory or proscriptive military power.[55] It follows, therefore, that in appropriate circumstances, the military may lawfully enforce civil laws if there is an independent military purpose.[56]

The Military Purpose Doctrine has developed through case law[57] and regulatory guidance. In the 1981 amendments to the Posse Comitatus Act, Congress directed the Secretary of Defense to prescribe specific regulations to clarify the Act by prohibiting service members from directly participating in the enforcement of civil laws.[58] The Secretary promulgated *Department of Defense Directive 5525.5*, which generally prohibits direct participation, but also distinguishes those forms of direct assistance that are permissible.[59] Principle among those forms of permissible assistance are "actions . . . taken for the *primary purpose* of furthering a military . . . function of the United States."[60]

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55. *See supra* Section II.B (describing Posse Comitatus Act).

56. *See* Major H.W.C. Furman, *Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 128 (1960):

> [T]he statute is limited to deliberate use of armed force for the primary purpose of executing civilian laws more effectively than possible through civilian law enforcement channels, and . . . those situations where an act performed primarily for the purpose of ensuring the accomplishment of the mission of the armed forces incidentally enhances the enforcement of civilian law do not violate the statute.

Furman's discussion of the Military Purpose Doctrine has been quoted by several courts. *See, e.g.*, United States v. Red Feather, 392 F. Supp. 916, 925 (D.S.D. 1975); State v. Nelson, 260 S.E.2d 629, 639 (N.C. 1979); Harker v. State, 663 P.2d 932, 936 (Alaska 1983); Anchorage v. King, 754 P.2d 283, 285 (Alaska App. 1988).

57. *See generally* Porto, *supra* note 14, at 299-305 (listing cases finding no violation of the Posse Comitatus Act where military authorities, although incidentally providing assistance to civil authorities, were primarily acting to achieve an independent military purpose).

58. 10 U.S.C.A. § 375 (West 1998).

59. DOD DIR. 5525.5, *supra* note 14, at encl. 4.

Whether the Military Purpose Doctrine permits military law enforcement activities will depend on the facts of each case and the military interests that are involved.[61] Courts will ask whether an independent military purpose justified military involvement, or whether the actions were intended primarily to aid civil authorities. Certainly, military officials may travel on or off post to investigate and arrest service members for violations of the UCMJ.[62] But when their law enforcement activities affect civilians, the rules are less clear.

B. Applying the Military Purpose Doctrine on the Federal Military Installation

One category of law enforcement activity that is generally deemed to be permissible under the Military Purpose Doctrine is "investigations or other actions related to the commander's inherent authority to maintain law and order on a military installation or facility."[63] This section defines the commander's inherent power to maintain law and order on the installation, and then determines the level of authority that military law enforcement officials derive from the commander to enforce civil laws.

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60. *Id.* (emphasis added). The directive states that the "military purpose" provision must be "used with caution, and does not include those actions taken for the primary purpose of aiding civilian law enforcement officials or otherwise serving as a subterfuge to avoid the restrictions" of the Act. *Id.* encl. 4, para. 1.2.1. The Directive provides that permissible actions may include the following:

> 1. Investigations and other actions related to enforcement of the Uniform Code of Military Justice (UCMJ).
> 2. Investigations and other actions that are likely to result in administrative proceedings by the Department of Defense, regardless of whether there is a related civil or criminal proceeding.
> 3. Investigations and other actions related to the commander's inherent authority to maintain law and order on a military installation or facility.
> 4. Protection of classified military information or equipment.
> 5. Protection of DOD personnel, DOD equipment, and official guests of the Department of Defense.
> 6. Such other actions that are taken primarily for a military or foreign affair's purpose.

Id. encl 4, paras. 1.2.1.1-1.2.1.6.

61. *Id.* encl. 4, para. 1.2.1.

62. Military officials have worldwide statutory arrest authority over service members for violations of the UCMJ. UCMJ arts. 5, 7(b) (West 1998).

1. Inherent Authority of the Installation Commander

The commander of a military installation has the inherent authority and responsibility to maintain law and order, security, and the discipline necessary to assure the proper functioning of the command.[64] The commander's authority is derived from the President who, as Commander-in-Chief, is responsible to ensure order and discipline is maintained in the Armed Forces.[65] His authority is also derived from Congress, which has the power, under the Property Clause of the U.S. Constitution, to "make all needful Rules and Regulations respecting the territory or other property belonging to the United States."[66] This authority is delegated by statutes[67] and implementing regulations[68] that hold the commander responsible for the maintenance and efficient operation of the installation.

In particular, two criminal statutes recognize the authority of the commander to maintain law and order. The Trespass Statute[69] makes it unlaw-

63. DOD DIR. 5525.5, *supra* note 14, encl. 4, para. 1.2.1.3. The Directive also cites, as permissible activity, "Investigations and other actions that are likely to result in administrative proceedings by the Department of Defense, regardless of whether there is a related civil or criminal proceeding." *Id.* encl. 4, para. 1.2.1.2. For example, an administrative proceeding may be the issuance of a "bar letter" to a civilian lawbreaker. *See* 18 U.S.C.A. § 1382 (West 1998) (allowing a commander to prohibit a person from entering a military installation). Actions taken to effect the proceeding, such as arrest, detention for a period long enough to coordinate a bar letter, and physical removal from the installation are all permissible actions that accomplish the military purpose.

64. Military Police Authority, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 1984/2412 (3 Aug. 1984); Arrest and Transportation of Civilians, Op. JAG, Air Force, No. 43 (5 May 1986) ("The power to maintain order, security, and discipline on a military installation is inherent in the authority of the military commander.").

65. U.S. CONST. art II, § 1.

66. *Id.* art. IV, § 3, cl. 2.

67. For example, Congress holds the Secretary of the Army responsible for the "functioning and efficiency of the Department of the Army," 10 U.S.C.A. § 3013c(1) (West 1998), and requires him to "issue regulations for the government of his department . . . and the custody, use, and preservation of its property." 5 U.S.C.A. § 301 (West 1998).

68. *See, e.g.*, DEP'T OF DEFENSE, DIR. 5200.8, SECURITY OF MILITARY INSTALLATIONS, para. 3.2 (25 Apr. 1991) [hereinafter DOD DIR. 5200.8] (declaring authority of installation commander to take reasonably necessary and lawful measures to maintain law and order on the installation); U.S DEP'T OF ARMY, REG. 210-10, INSTALLATIONS ADMINISTRATION, para. 2-9 (12 Sept. 1977) [hereinafter AR 210-10] ("The installation commander is responsible for maintenance of law and order at the installation."); DEP'T OF ARMY, REG. 190-13, PHYSICAL SECURITY: THE ARMY PHYSICAL SECURITY PROGRAM, para. 1-5q(1) & app. D (30 Oct. 1993) [hereinafter AR 190-13] (designating installation commanders as having "authority to enforce the necessary regulations to protect and secure places and property under their command").

ful for a person to enter an installation for an unlawful purpose and authorizes the commander to expel and prohibit the re-entry of violators.[70] The Internal Security Act of 1950[71] makes it a criminal misdemeanor to violate any "regulation or order" issued by any "military commander designated by the Secretary of Defense" for the "protection or security of" property and places subject to his jurisdiction.[72]

The United States Supreme Court has recognized the commander's inherent authority to preserve order. In *Greer v. Spock*, the Court noted the "historically unquestioned power" of a commander to prevent civilian disruptions on a military installation.[73]

The Military Purpose Doctrine requires a legitimate, independent military purpose for participating in law enforcement activities against civilians. The inherent authority–and responsibility–of the commander in maintaining law and order on the installation is clearly a valid military purpose.

2. The Authority of Military Law Enforcement Officials on the Installation

The law enforcement authority of the installation commander flows to military law enforcement officials.[74] With this authority, military law enforcement officials have the power to arrest[75] civilian lawbreakers for

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69. 18 U.S.C.A. § 1332 (West 1998) ("Whoever, within the jurisdiction of the United States, goes upon any military . . . installation, for any purpose prohibited by law or regulation; or whoever reenters . . . such installation after having been removed therefrom or ordered not to enter by the officer in command thereof, shall be [guilty of a misdemeanor].").

70. The authority of the commander to expel a civilian from the installation arguably implies the authority to arrest and detain a lawbreaker long enough to write a "bar letter," escort the individual off the installation, or deliver him to civil authorities.

71. 50 U.S.C.A. § 797 (West 1998). This statute is implemented in DOD by DOD Directive 5200.8, which designates those "commanders authorized to issue regulations for the protection or security of property or places under their command in accordance with" the Internal Security Act. *See* DOD DIR. 5200.8, *supra* note 68.

72. 50 U.S.C.A. § 797.

73. Greer v. Spock, 424 U.S. 828, 838 (1976); *see also* Cafeteria Workers v. McElroy, 367 U.S. 886, 892-93 (1961) (recognizing military commander's power to preserve order among civilians on the installation and holding, "There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.").

the military purpose of maintaining law and order on the installation. This subsection reviews the extent of this power.[76]

Although military law enforcement officials have no specific statutory grant of formal arrest authority over civilians,[77] it is generally accepted that they may arrest civilians on the installation.[78] The arrest power is limited, however, to a reasonable period of time sufficient to investigate the crime and transfer the lawbreaker to civil authorities with criminal jurisdiction for purposes of prosecution.[79]

What is a "reasonable period of time" will depend on the circumstances of the case. In *United States v. Matthews*,[80] military police detained a civilian for ten hours, subjected him to questioning by various investigators, and searched his person and vehicle. The Tenth Circuit Court of Appeals found the arrest to be properly based on probable cause and the detention to be a reasonable period to investigate whether a crime had in fact been committed.[81] In a recent case, *United States v. Mullin*,[82] the Fifth Circuit Court of Appeals held that a twenty-two hour detention was reasonable where the suspect had concealed his age and identity and

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74. Military Police Authority, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 1984/2412 (3 Aug. 1984) (describing military police as "acting as agents of the installation commander, vis-à-vis civilians who threaten or impede the normal functioning of the command by conduct which is criminal or otherwise proscribed by appropriate regulations").

75. Again, "arrest" in this article refers to the commonly used, conventional civilian term developed in the common law. Through a series of Fourth Amendment cases, the United States Supreme Court has attempted to define arrest. *See, e.g.*, Florida v. Royer, 460 U.S. 491 (1983). In its basic form, "arrest occurs when a person's liberty has been restricted by law enforcement officers to the extent that he is not free to leave at his own volition." WHITEBREAD & CHRISTOPHER, *supra* note 5, § 3.02.

76. Although not addressed in this section, another legal basis for the power of military law enforcement officials to arrest civilian lawbreakers on the installation is a "citizen's arrest." In *United States v. Mullin*, the Fifth Circuit Court of Appeals recently reviewed a case in which Fort Hood military police arrested a civilian after observing him burglarize a car on the installation. United States v. Mullin, No. 97-50904, 1999 U.S. App. LEXIS 12092 (5th Cir. June 10, 1999). The Court held that, "although military police are not designated peace officers under [Texas law], they can make an arrest when Texas law authorizes such an arrest by a 'private person.'" *Id.* at *8. Because "citizen's arrest" was a sufficient basis to warrant the arrest on the facts at hand, the Court did not consider other potential legal bases for military officials to arrest civilians. *Id.* The Court did not discuss the "inherent authority of the installation commander" as a legal basis. *See id.* This article will discuss the concept of "citizen's arrest" more fully in Section IV.B.1, *infra*.

77. *See supra* Section II.A (describing lack of specific Congressional grant of statutory arrest powers).

military police investigators had made diligent efforts to involve civil

78. *See* Use of Military Personnel to Maintain Order Among Cuban Parolees on Military Bases, 4 Op. Off. Legal Counsel 643, 646 (1980) (opinion of Assistant Attorney General of the United States that military law enforcement officials clearly have authority to arrest civilians on military bases when they are a threat to good order and discipline of the base, and that they may use sufficient force necessary to effect such arrests); Law Enforcement at San Onofre Nuclear Generation Plant, 1 Op. Off. Legal Counsel 204, 206 (1977) (opinion of Deputy Assistant Attorney General of the United States that, when on a military installation, military law enforcement officials may apprehend civilian lawbreakers without violating the Posse Comitatus Act); Military Police Authority, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 1984/2412 (3 Aug. 1984) (opining that a California state law cannot limit on-post apprehension authority of military police as to "civilians who threaten or impede the normal functioning of the command by conduct which is criminal or otherwise proscribed by appropriate regulations" and that military police may eject civilians from the installation, serve them with citations to U.S. District Court, or detain them pending transfer to civil authorities); Civilian Police/Guard Authority and Liability, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 1979/3255, para. 1b (14 Sept. 1979) (opining that military law enforcement officials may "apprehend and detain . . . civilians when on-post and for offenses committed on-post under the general authority of the installation commander to maintain law and order on the installation"); 53 AM. JUR. 2D *Military Installations* § 246 (1995) ("Military personnel are authorized by the statutory powers regarding unlawful reentry onto a military reservation . . . to arrest and detain civilians for on base violations of civil law where their actions are based on probable cause.").

Again, as stated earlier in this article, there is some resistance by military legal advisors to acknowledge that military law enforcement officials are "arresting" civilians. *See supra* note 5 (reviewing of Air Force Judge Advocate General's opinion that military law enforcement authorities may not "arrest" but may "detain" civilians for reasonable periods, based on probable cause, pending transfer to civil authorities). For Fourth Amendment purposes, however, "detaining civilians pending transfer to civil authorities" is nevertheless an arrest. In a civilian criminal court, a judge is going to analyze the military's "detention" as an arrest.

79. DOD DIR 5200.8, *supra* note 68, para. 3.2.4 (authorizing commander of installation to detain civilians who violate the Trespass Statute, 18 U.S.C.A. § 1382 (West 1998), until civil authorities can respond); AR 190-30, *supra* note 3, para 4-8 ("Civilians committing offenses on U.S. Army installations may be detained, until they can be released to the appropriate federal, state, or local law enforcement agency."); AR 195-2, *supra* note 26, para. 3-31. Agents of the United States Army Criminal Investigation Command are

> authorized to apprehend civilians on military installations or facilities where there is probable cause to believe that person has committed an offense cognizable under the criminal laws of the United States. Such persons will be held only until they can be released to an appropriate Federal, State, or local law enforcement agency, or to civilian authorities in accordance with local procedures.

Id.

80. 615 F.2d 1279 (10th Cir. 1980).

81. *Id.* at 1284.

authorities.[83]

Perhaps the most generous case for defining the power of military law enforcement officials on the installation is a Ninth Circuit case, *United States v. Banks*.[84] In *Banks*, Air Force security police arrested the civilian defendant in a barracks room on an Air Force base for possession of drugs. The defendant argued that the Posse Comitatus Act prohibited the Air Force from arresting him; thus, the evidence seized incident to the arrest should be suppressed.[85] The Ninth Circuit held that, when their actions are based on probable cause, military law enforcement personnel may arrest and detain civilians for on-base criminal violations.[86] In a statement that aligns well with the "Military Purpose Doctrine," the court held that the "power to maintain order, security, and discipline on a military reservation is necessary to military operations."[87] Thus, the court held, the Posse Comitatus Act "does not prohibit military personnel from acting upon on-base violations committed by civilians."[88]

In *Anchorage v. King*,[89] the Alaska Court of Appeals reviewed whether Air Force security police at an installation entrance gate could arrest an intoxicated motorist entering the installation and turn him over to civil authorities. Applying the Military Purpose Doctrine, the court held that the gate guard had an "independent military duty and purpose to pro-

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82. United States v. Mullin, No. 97-50904, 1999 U.S. App. LEXIS 12092 (5th Cir. June 10, 1999).

83. *Id.* at *16-17.

84. 539 F.2d 14 (9th Cir. 1976).

85. *Id.* at 15.

86. *Id.* at 16. The court cites the Trespass Statute, 18 U.S.C. § 1382, without comment as to how it provides the legal authority for arrest power. The court apparently concludes that the Trespass Statute, which permits the commander to expel and prohibit the re-entry of a civilian, implies the power to arrest.

The court also held that military personnel have the authority to interrogate and, upon probable cause or incident to arrest, search a civilian lawbreaker. *Banks*, 539 F.2d at 16.

87. *Banks*, 539 F.2d at 16 (citing Cafeteria Workers v. McElroy, 367 U.S. 886 (1961), a seminal case recognizing the inherent authority of the installation commander).

88. *Id.* Another case that broadly recognizes on-post arrest powers is *Kennedy v. United States*, 585 F. Supp. 1119 (D.S.C. 1984), a case involving a claim of false arrest under the Federal Tort Claims Act. In *Kennedy*, the District Court of South Carolina held: "Military police are law enforcement officers who possess power to make arrests for violations of [f]ederal law. While they normally confine their activities to enforcement of military law, they do possess all powers that civilian law enforcement officers have, *on* military property." *Kennedy*, 585 F. Supp. at 1123 (emphasis added).

89. 754 P.2d 283 (Alaska App. 1988).

tect the welfare of persons on base," which justified the military involvement.[90]

Through numerous federal and state court decisions and regulatory guidance, the arrest authority of military law enforcement officials over civilian lawbreakers on the installation is generally settled. Their power is derived from the installation commander's inherent authority to maintain law and order on the installation. Furthermore, their actions are protected by the Military Purpose Doctrine from violating the Posse Comitatus Act. At a minimum, military officials may, with probable cause, arrest a civilian and detain him for a reasonable period while pending transfer to civil authorities. Much less clear, however, is the authority of military law enforcement officials once they cross the boundaries of the installation.

C. Application of the Commander's Inherent Authority and the Military Purpose Doctrine Off the Federal Installation

In some circumstances, the commander's inherent authority and responsibility to protect the installation will necessitate off-post law enforcement activities. As they depart the installation, however, the authority of military law enforcement officials will decrease. When acting on the installation regarding an *on*-post crime, military law enforcement officials may arrest, detain, interrogate, and search the suspect.[91] But, off the installation, their actions are much more limited by the Posse Comitatus Act. The Military Purpose Doctrine generally will permit only those actions that support a legitimate military purpose. Unless a nexus is found, whereby *off*-post criminal activity somehow adversely impacts the maintenance of law and order on the installation, the military's interest will be too remote. But, where a legitimate, independent military purpose exists, military law enforcement officials are authorized to conduct activities, although mainly investigatory. This subsection reviews the authority of military law enforcement officials to travel off-post and investigate criminal activities.

In *Department of Defense Directive 5525.5*, the Secretary of Defense provides regulatory guidance on the Military Purpose Doctrine and lists

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90. *Id.* at 286. The court noted that the security policeman's subsequent actions, including transportation to the local police station, signing the complaint, and transportation to a magistrate, were all performed with the same independent purpose, and were thus permissible.

91. *Banks*, 539 F.2d at 14. *See generally supra* Section II.A.2.

various law enforcement activities that, while directly assisting in the enforcement of civil laws, do not violate the Posse Comitatus Act.[92] The directive does not limit such permissible activities to on-post law enforcement; these activities apply *off post* as well. In off-post law enforcement operations involving civilians,[93] the most applicable category of permissible action is "investigations and other actions related to the commander's inherent authority to maintain law and order on a military installation."[94] In other words, when off-post criminal activity adversely impacts the welfare of persons and the efficiency of operations on post, a legitimate, independent military purpose exists.

The "criminal investigation" is the primary form of law enforcement activity in which military law enforcement officials engage off the installation.[95] Military law enforcement officials have investigative authority[96] wherever a legitimate military interest exists.[97] A military interest in civilian criminal activity exists when the military is a victim of a crime (such as the theft or destruction of government property, or fraud) or there is a need to protect personnel, property, or activities on the military installation (such as the introduction of illegal drugs onto the installation).[98]

The most common type of off-post investigation of civilians is the investigation of illegal drug distribution. The Department of Defense has

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92. DOD DIR. 5525.5, *supra* note 14, encl. 4, para. 1.2.1.

93. The authority of military law enforcement officials to investigate and arrest service members is worldwide. UCMJ art. 5 (West 1998); *see* AR 195-2, *supra* note 26, para. 3-21 (authorizing Army CID agents to "apprehend persons subject to the UCMJ, regardless of location").

94. DOD DIR. 5525.5, *supra* note 14, encl. 4, para 1.2.1.

95. Section IV, *infra*, will discuss two other forms of off-post law enforcement: "hot pursuit" of a law breaker who departs the installation, and "emergency response" to an off-post crime in progress.

96. "Investigative authority" exists when the investigative agency has the "legal authority (jurisdiction) to conduct a criminal investigation." AR 195-2, *supra* note 26, para. 3-1(a). *See also* JA-221, *supra* note 13, para. 3-1 ("As long as the military pursues the investigation of an offense with a view toward establishing facts to sustain a court-martial or to pursue a legitimate military function or purpose, then any incidental investigative benefit to civilian law enforcement officials is immaterial.").

97. *See, e.g.*, AR 195-2, *supra* note 26, para. 3-1 ("The Army has investigative authority whenever an Army interest exists and investigative authority has not been specifically reserved to another agency."). Another limitation is that the offense must not be within the investigative purview of the Department of Justice (DOJ), which would require deference to the DOJ investigative authority pursuant to inter-agency agreement. *Id.* (citing Memorandum of Understanding between the Department of Defense and Department of Justice relating to the investigation and prosecution of certain crimes).

explicitly declared, as policy, that the suppression of drugs being introduced onto military installations is an "important military interest."[99] Thus, while recognizing that the "investigation of drug offenses outside the military installation normally is the responsibility of non-DOD law enforcement officials," Department of Defense policy authorizes military law enforcement officials to undertake such investigations with respect to both service members and civilians.[100] The policy does, however, specifically prohibit direct participation in enforcing the law, such as searches, arrests, or apprehensions of civilians, unless otherwise authorized by law.[101] The Department of Defense has concluded that such direct

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98. *See, e.g., id.*

> Generally, an Army interest exists when one or more of the following apply: . . . (4) The Army is the victim of the crime; e.g., the offense involves the loss or destruction of government property or allegations of fraud . . . relating to Army programs or personnel. (5) There is a need to protect personnel, property, or activities on Army installations from criminal conduct on military installations that has a direct adverse effect on the Army's ability to accomplish its mission; e.g., the introduction of controlled substances onto Army installations.

Id.

99. Policy Memorandum Number 5, Inspector General, Department of Defense, subject: Criminal Drug Investigative Activities (1 Oct. 1987) [hereinafter Policy Memorandum 5] ("Drug offenses by DOD personnel and the introduction of drugs onto military installations adversely affect the efficiency and effectiveness of DOD programs.").

100. *Id.* The policy memorandum instructs the secretaries of the military departments to prescribe regulations to guide such investigations. *Id.* The regulations must allow drug investigations only where a military interest is clearly present. *Id.* As an example, see AR 195-2, *supra* note 26, para. 3-32.

> A particular drug operation should not be conducted unless there is an identifiable connection between the drug traffickers being investigated and the U.S. Forces personnel. Such connection is present only if the traffickers are known or suspected to have had recent drug transactions with U.S. Forces personnel or if the traffickers distribute in an area where experience indicates a substantial portion of the available drug supply is obtained by U.S. Forces personnel.

Id.

The military departments may limit off-post investigative authority to certain types of law enforcement officials. The Army, for example, limits off-post investigative authority to agents of the U.S. Army Criminal Investigation Command (USCIDC). *Compare* AR 195-2, *supra* note 26, para. 3-21 *with* AR 190-30, *supra* note 3, para. 4-2 (stating that military police investigators, who are not members of USCIDC, have *no* investigative jurisdiction over criminal incidents occurring off the installation).

actions–while permissible on the installation–are beyond the scope of the military's authority, are without sufficient military interest,[102] and would perhaps violate the Posse Comitatus Act.

Both federal and state courts have reviewed cases where a "military purpose" was proposed as justification for off-post drug investigations.[103] Courts have generally held that, where the military involvement is limited, and where there is an independent military purpose of preventing the flow of drugs onto the installation, the actions of military law enforcement officials will not violate the Posse Comitatus Act.[104] Generally, as long as military law enforcement officials do not "pervade" the activities of civil officials and do not subject citizens to the "regulatory exercise of military power," their actions will be permissible.[105]

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101. Policy Memorandum 5, *supra* note 96, para. 4.c(5); *see* AR 195-2, *supra* note 26, para. 3-1c.

> No USACIDC personnel, in their official capacity, have authority to arrest, with or without an arrest warrant, civilians outside the limits of a military installation. When such an arrest is necessary in the conduct of a CID investigation, an arrest warrant must be obtained and executed by a civil law enforcement officer with statutory arrest authority. CID agents may accompany the arresting civil law enforcement official for purposes of identifying the person to be arrested and providing back up assistance.

Id.

102. While the military has a clear interest in investigating drug operations, the authority to effect an arrest or search is not essential, since military law enforcement officials can coordinate in advance with civil authorities if the need may exist. *See, e.g.*, AR 195-2, *supra* note 26, paras. 3-21, 3-22 (requiring Army criminal investigation agents to have civil authorities obtain and execute *arrest* warrants when necessary, and–although *permitting* agents to obtain off-post *search* warrants on their own–requiring them to be accompanied by a civil law enforcement authority when executing the search warrant).

103. *See generally* Porto, *supra* note 14, at 288-95 (reviewing cases where passive participation by military law enforcement was held not to violate the Posse Comitatus Act).

104. *See* Hayes v. Hawes, 921 F.2d 100, 103 (7th Cir. 1990) (reviewing several federal and state cases involving military law enforcement in off-post drug investigations); Harker v. State, 663 P.2d 932, 936 (Alaska 1983) ("In the majority of cases in which no violation has been found, the independent military purpose that justified the military conduct was the prevention of illicit drug transactions involving active duty military personnel regardless of whether such conduct took place on military installations.").

105. United States v. Bacon, 851 F.2d 1312, 1313 (11th Cir. 1988); *see* United States v. Hartley, 796 F.2d 112, 114 (5th Cir. 1986) (holding that military involvement must be "pervasive" to violate the Act).

Violations of the Act have been found where military law enforcement officials were acting *at the request of* civil officials, and thus not for an independent military purpose,[106] and where military officials did have a valid military purpose, but exceeded the bounds of their authority by *participating directly* in the enforcement.[107] In *Taylor v. State*,[108] a military investigator requested civilian authorities to assist him in conducting a joint investigation of an off-post drug dealer. Acting undercover,[109] the investigator purchased drugs from the dealer, and an arrest followed. The military investigator then "actively participated" by drawing his weapon to effect the arrest, searching the house, seizing the illegal drugs, and delivering the drugs to a lab for testing.[110] The Oklahoma Court of Criminal Appeals found that the military participation was excessive and thus violated the Posse Comitatus Act.[111]

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106. *See, e.g.*, United States v. Walden, 490 F.2d 372, 374 (4th Cir. 1974) (finding a violation when Marine investigators, at the request of civilian authorities, participated in undercover sting of illegal firearms sales operation).

107. *See, e.g.*, State v. Danko, 578 P.2d 819 (Kan. 1976) (finding violation where military policeman, while participating in a joint patrol program with local police, conducted search of a vehicle).

108. 645 P.2d 522, 523 (Okla. Crim. App. 1982).

109. One commentator has reviewed whether the actions of a military undercover agent subjects civilians to the unlawful exercise of military power. *See* Colonel Paul Jackson Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MIL. L. REV. 109, 128-33 (1984). If the agent arrests or searches the civilian, courts will likely find that he violated the Posse Comitatus Act. *Id.* But a review of the case law reveals that, as long as the investigator can show a military connection apart from a mere assertion of authority over civilians, courts are generally satisfied that the Military Purpose Doctrine is the basis, and a violation of PCA has not occurred. *Id.* It must be shown that the off-post investigative activities served to accomplish official military functions related to protecting discipline, morale, safety, and security of the installation. *Id.*

110. *Taylor*, 645 P.2d at 523.

111. *Id.* at 525. The court also held that the violation was significantly egregious to warrant suppression of the evidence seized during the search incident to the arrest. *Id.* The court noted that violations of the Posse Comitatus Act do not necessitate application of the exclusionary rule, that violations are not of the same magnitude as violations of the Fourth Amendment, and that numerous state and federal courts had declined to apply the exclusionary rule to violations of the Act. *Id.* at 524. But, the court held that each case must be looked at individually to determine whether the conduct rose to an intolerable level justifying application of the rule. *Id.* This case appears to be the only reported case where the exclusionary rule was applied to address a Posse Comitatus Act violation. *See* Saviano, *supra* note 43, at 64 (noting that while three state court decisions had applied the exclusionary rule, two were reversed on appeal, leaving *Taylor v. State* as the only valid state court decision).

In sum, the commander's inherent authority and the Military Purpose Doctrine provide the legal bases for military law enforcement officials to arrest, interrogate, detain, and search civilians for on-post violations. These legal bases also support *off-post* investigations when the military has a clear interest in stopping the criminal activity involved, such as illegal drug distribution to service members. Off-post investigations, however, are generally limited by case law and Department of Defense policy to *passive* participation. Direct help, such as arrests and searches conducted by military officials, will likely violate the Posse Comitatus Act by "pervading" the authority of civil law enforcement. Fortunately, in the context of investigations, military investigators have sufficient time to coordinate in advance with civil authorities if they expect an arrest or search to be necessary.

What about when there is no time? The next section analyzes two off-post scenarios where military law enforcement officials must react immediately–and will necessarily participate "directly" by conducting an arrest.

IV. Authority of Military Law Enforcement in Hot Pursuit and in Response to Emergencies

The opening scenario to this article posed a dilemma that military law enforcement officials are likely to encounter: can they pursue a lawbreaker who leaves the installation? What may they do if they catch the lawbreaker? Another questionable scenario is an off-post "emergency in progress." What if a military law enforcement official, positioned at the entrance gate of an installation, observes a crime in progress just off the installation–one in which human safety is at risk, such as a robbery? Or, what if the same official is approached by a frantic person who begs for assistance in stopping a violent crime in progress "just down the street"?[112]

112. In January 1996, at Fort Campbell, Kentucky, this type of situation occurred. Two military policemen were guarding the main entrance gate to the installation when three soldiers in a car drove up to the gate and frantically begged for assistance in stopping a fight that was in progress less that one quarter mile from the gate. The soldiers excitedly claimed that their friends were being "pummeled" by a group of violent civilians. The military police refused to assist, stating that it was outside their jurisdiction. Minutes later, one soldier and one civilian were dead.

As this section will establish, the military police at Fort Campbell could have responded to this emergency. The state "citizen's arrest" law would have provided sufficient legal basis for the exertion of authority. Additionally, since there was a "military purpose" involved (protecting service members), the military policemen were not at risk of violating the Posse Comitatus Act.

In both scenarios, time is of the essence–there will be no call to the local sheriff for coordination. The action will not be "indirect" or "passive"–rather, it will be *direct*, and may involve the use of force. This section examines the legal bases that may justify a military official's response in these scenarios.[113]

A. Hot Pursuit

"Hot pursuit," also known as "fresh pursuit," refers to the "common-law right of a police officer to cross jurisdictional lines to arrest a felon."[114] If a military law enforcement official is in hot pursuit of a civilian lawbreaker, he must know whether he can legally follow the person off the installation. If he catches and stops the person, he must know what authority he has–if any–to arrest, search, and transport the person back to the installation.

There are no statutes, regulations, military department directives, or appellate court cases that squarely address the authority of a military law enforcement official to engage in an immediate off-post pursuit. This subsection, therefore, reviews two alternative legal bases for this type of pursuit: (1) extension of the commander's inherent authority and the Military Purpose Doctrine, as discussed in Section II, and (2) the common law doctrine of extraterritorial authority to conduct a warrantless arrest in hot pursuit.

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113. There will be some overlap in the proposed legal bases. In the context of "hot pursuit," arrest power is based on the inherent authority of the installation commander to maintain law and order on the installation (and the Military Purpose Doctrine) and on the common law doctrine of extraterritorial arrest authority when in hot pursuit. For the "emergency response" to a crime in progress, "citizen's arrest" authority provides the only legal basis. The citizen's arrest authority, however, also supports the exertion of authority while in hot pursuit: once an officer crosses outside his territorial jurisdiction, he has *at least* the powers of an ordinary citizen of that state. The distinction is that, with the common law doctrine of extraterritorial authority, the officer who is in hot pursuit assumes the authority of a law enforcement official in the jurisdiction where he finds himself–he is not just an ordinary citizen. Thus, the reader should understand that this section presents only the doctrine of extraterritorial jurisdiction as authority during hot pursuit; the citizen arrest authority discussed in Section IV.B.1, *infra*, will also provide legal authority for an arrest in hot pursuit.

114. BLACKS LAW DICTIONARY 667 (6th ed. 1990); *see* 6A C.J.S. *Arrest* § 18 (1975) ("[C]lose pursuit . . . is pursuit instituted immediately and with intent to recapture or reclaim, as where a thief is fleeing with stolen goods . . . .").

1. Hot Pursuit as a Military Purpose

In appropriate circumstances, the commander's inherent authority to maintain law and order *on* the installation will provide the legal basis for pursuing a civilian lawbreaker *off* the military installation. Under the Military Purpose Doctrine, since the pursuit will achieve an independent military purpose, there will be no violation of the Posse Comitatus Act. [115]

Courts reviewing whether military law enforcement officials violated the Posse Comitatus Act have generally held that, where military involvement is limited and there is an independent military purpose to justify the activity, no violation will occur.[116] In addition, the involvement must not "constitute the exercise of regulatory, proscriptive, or compulsory military power," must not amount to "direct active involvement in the execution of the laws," and must not "pervade the activities of civil authorities."[117]

The independent military purpose in the "hot pursuit" scenario is clear. The commander has the authority and the responsibility to maintain law and order on the installation.[118] Military law enforcement officials, as the commander's agents, have the responsibility to protect the installation from criminals. When they pursue a lawbreaker, the pursuit is for this independent military purpose, and not to aid civil authorities, that may have no interest at all in pursuing the lawbreaker.[119] As they cross the installation boundaries to pursue a lawbreaker, they carry the commander's inherent authority with them.

One challenge to this theory is that, once the lawbreaker is chased off the installation, the safety of the installation is restored and the military no longer has an independent interest in pursuit. A similar argument was made by the defendant in *Anchorage v. King*,[120] an Alaska Court of Appeals case in which an intoxicated driver was stopped at the entrance gate to an Air Force base. The driver offered to not enter the installation, but the gate guard apprehended him nevertheless. The court dismissed the

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115. *See* DOD DIR. 5525.5, *supra* note 14, encl. 4 para. 1.2.1.

116. *See, e.g.*, Hayes v. Hawes, 921 F.2d 100, 103 (7th Cir. 1990); Harker v. State, 663 P.2d 932, 936 (Alaska 1983).

117. United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (setting out the three established tests to determine when military involvement constitutes more than just indirect assistance); *see* United States v. Hartley, 678 F.2d 961, 978 n.24 (11th Cir. 1982); United States v. Kahn, 35 F.3d 426, 431 (9th Cir. 1994).

118. *See supra* Section III.A.1 (describing inherent authority of the installation commander to maintain law and order, security, and discipline on the installation).

defendant's argument that his departure would serve the military's purpose, stating that "the military's independent purpose to protect the welfare of persons on base includes the duty to ensure that on-base DWI offenders are prosecuted, so that future offenders will be deterred."[121] Thus, in cases of egregious crimes[122] that must be deterred, the military has a clear interest in pursuing the lawbreaker.

A hot pursuit is unlikely to violate the Posse Comitatus Act by "pervading" the activities of civil law enforcement officials. Hot pursuit will occur infrequently, and each pursuit will be an isolated event, unlikely to attract much interest by civil authorities unless the chase itself becomes a danger to the community. Furthermore, actions that are taken will be the minimum necessary to stop the fleeing lawbreaker and to transport him back to the installation for interrogation, search, and eventual transfer to civil authorities or release.

Two courts have found violations of the Posse Comitatus Act by military officials when civil authorities *requested* direct assistance from the military.[123] In these cases, since the military's actions were primarily to aid civil authorities–even if incidentally beneficial to the military–the actions did not satisfy a military purpose. In the context of a hot pursuit,

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119. Once the lawbreaker is pursued and arrested, he may be returned to the installation where law enforcement officials have various options. In egregious cases, he may be held, pending transfer to civil authorities. For example, if the installation has concurrent jurisdiction, state authorities may assume jurisdiction and prosecute the offender. In less egregious cases, the official may cite the civilian with DD Form 1805 (United States District Court Violation Notice), which refers the case as a misdemeanor to U.S. District Court before a U.S. Magistrate. Finally, the law enforcement official may obtain a "bar letter" from the installation commander, banning the civilian from re-entry onto the installation. *See* 18 U.S.C.A. § 1382 (West 1998) ("Whoever, within the jurisdiction of the United States, goes upon any military . . . installation, for any purpose prohibited by law or regulation; or whoever reenters . . . such installation after having been removed therefrom or ordered not to enter by the officer in command thereof, shall be [guilty of a misdemeanor].").

120. 754 P.2d 283 (Alaska App. 1988).

121. *Id.* at 286.

122. Certainly, military law enforcement officials may not pursue lawbreakers for every criminal act. Because of the dangers involved in a police chase, officials should pursue only the most egregious offenders.

123. *See* United States v. Walden, 490 F.2d 372, 374 (4th Cir.1974) (finding violation when Marine investigators, at the request of civilian authorities, participated in undercover sting of illegal firearms sales operation); Wrynn v. United States, 200 F. Supp. 457, 463-65 (E.D.N.Y. 1996) (finding violation where military pilot, at the request of state authorities, flew a helicopter off the base to search for an escaped convict).

however, the actions of military law enforcement officials will be wholly at their *own independent initiative* and not primarily to aid civil authorities.

Another factor that courts consider is whether the actions were limited and "indirect."[124] In the context of a hot pursuit, the actions of military law enforcement will necessarily be direct. But, such direct action does not necessarily mean that a violation has occurred. In two cases where violations were found due to overly direct participation in enforcing civil laws, the military law enforcement officials involved did not *have to* engage in the direct acts.[125] Civil authorities were present in both cases and were capable of enforcing the law, but the military officials nevertheless participated by effecting the arrest or conducting a search. During a hot pursuit, civil authorities will not likely be available; it is reasonable to expect, therefore, that military officials in such circumstance have no other option but to use direct action to subdue the fleeing criminal.

In sum, application of the commander's inherent authority and the military purpose analysis in the hot pursuit context is not greatly different from the analysis in on-post arrests and in off-post investigations. Generally, if there exists a legitimate, independent military interest, the activity will be lawful and no violation of the Posse Comitatus Act will occur. The following subsection provides an alternative legal basis: the common law doctrine of extraterritorial authority when in hot pursuit.

2. Common Law Doctrine of extraterritorial Authority to Arrest When in Hot Pursuit

The common law doctrine of "hot pursuit" provides that a law enforcement officer may pursue a felon or a suspected felon outside his territorial jurisdiction and arrest him there.[126] This subsection reviews the

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124. United States v. Bacon, 851 F.2d 1312, 1313-14 (11th Cir. 1988).

125. *See* State v. Danko, 578 P.2d 819 (Kan. 1976) (finding violation where military policeman, while participating in a joint patrol program with local police, conducted search of a vehicle); Taylor v. State, 645 P.2d 522, 523 (Okla. Crim. App. 1982) (finding violation where military investigator "actively participated" by drawing his weapon to effect the arrest, searching the house, seizing the illegal drugs, and delivering the drugs to a lab for testing).

126. *See* Stevenson v. State, 413 A.2d 1340, 1343 (Md. 1980); Molan v. State, 614 P.2d 79, 80 (Okla. Crim. App. 1980); State v. Slawek, 338 N.W.2d 120, 123 (Wisc. App. 1983); Wright v. State, 473 A.2d 530, 533 (Md. Ct. Spec. App. 1984); Six Feathers v. State, 611 P.2d 857 (Wyo. 1980) (citing 5 Am. Jur 2D); *see generally* 5 Am. Jur. 2d *Arrest* § 72 (1995); 6A C.J.S. *Arrest* § 53 (1975).

common law hot pursuit doctrine and determines its application to the military law enforcement official pursuing a civilian lawbreaker off the installation.

As a general rule, a law enforcement officer who is acting outside his territorial jurisdiction acts beyond his official capacity and, thus, has no official police power to arrest.[127] The hot pursuit doctrine recognizes that a criminal may "head straight across jurisdictional lines, following commission of a crime, knowing that there is safety on the other side."[128] The doctrine dispels this fiction by authorizing a pursuing law enforcement officer to arrest a fleeing lawbreaker in another jurisdiction.[129]

The hot pursuit doctrine applies only when the officer forms the requisite probable cause to arrest and begins chase in his own jurisdiction, and then continues the chase until the suspect is stopped.[130] Due to the extraordinary measures involved and the potential safety risks, the doctrine only applies to felonies, and not to misdemeanors.[131] The pursuit must be "continuous and uninterrupted, but continuous surveillance of the suspect or uninterrupted knowledge of the suspect's whereabouts is not necessary."[132]

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127. *See* People v. Marino, 400 N.E.2d 491, 494 (Ill. App. Ct. 1980) (recognizing common law rule that officers have "no power to make warrantless arrests outside the territorial limits of the political entity which appointed them to their office" unless an exception exists, such as "fresh pursuit" or "citizen's arrest" authority); *Stevenson*, 413 A.2d at 1343; *Slawek*, 338 N.W.2d at 122; *see generally* 6A C.J.S. *Arrest* § 53 (1975) ("An offense against the law is the justification for an arrest, and since the laws of one sovereignty have no extraterritorial operation, an offense against the laws of one state does not authorize an arrest therefor in another state.")

128. 5 AM. JUR. 2D *Arrest* § 72 (1995).

129. *Id.*

130. Molan v. Oklahoma, 614 P.2d 79, 80 (Okla. Crim. App. 1980) ("Fresh pursuit requires that an officer begin his chase in his or her own jurisdiction and continue it until the person is caught."); *see also* 5 AM JUR. 2D *Arrest* § 72 (1975). The doctrine does not apply where the offense occurred outside the officer's territorial jurisdiction. *Id.* Thus, if a military police gate guard witnessed a crime outside the installation gate, the hot pursuit doctrine would *not* justify giving chase. *See infra* Section IV.B. for a discussion of other legal bases to warrant a response in such a situation.

131. *See Stevenson*, 413 A.2d at 1343; *Wright*, 473 A.2d at 533; 5 AM. JUR. 2D *Arrest* § 72 (1995); 6A C.J.S. *Arrest* § 53 (1975).

132. 5 AM JUR. 2D *Arrest* § 72 (1995); *see also* Six Feathers v. Wyoming, 611 P.2d 857, 861 (Wyo. 1980) (defining hot pursuit as not "instant pursuit" but "pursuit without unreasonable delay").

Some states have enacted a statute permitting police officers from other states to enter the state when in hot pursuit of a fleeing felon and effect an arrest there.[133] Once the pursuing officer enters the state, he assumes the same powers of arrest as the officers of that state.[134] Nevertheless, even if a state has not enacted such a statute, the common law doctrine will still apply.[135]

The common law hot pursuit doctrine is applicable to military law enforcement officials who pursue lawbreakers off the military installation. On the installation, they have the power to arrest civilians, based on the inherent authority of the installation commander.[136] Under the hot pursuit doctrine, their authority may be transferred off the installation when they are directly pursuing a criminal. Once they are outside the installation, they assume at least the same authority possessed by local police.

3. Practical Considerations

To lawfully conduct a hot pursuit, military law enforcement officials must limit their pursuits to only those crimes that are felonious. Most obvious are violent crimes, such as an aggravated assault or robbery. Military law enforcement officials must be trained to recognize those offenses that warrant pursuit.[137] Additionally, installation law enforcement departments should establish clear guidelines that clarify when a pursuit is authorized and how to conduct it (for example, rules of engagement, to include deadly force).[138]

Another worthy consideration is to establish a memorandum of understanding between the military law enforcement department and the

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133. *See, e.g.*, MD. CODE ANN., FRESH PURSUIT, art. 27, § 595 (1996) (providing that peace officers of another state may, when in "fresh pursuit" of a fleeing felon, effect the felon's arrest in Maryland to the same extent as a Maryland police officer).

134. *See, e.g., id.*

135. Commonwealth v. Gullick, 435 N.E.2d 348, 351 (Mass. 1982); Wright v. State, 473 A.2d 530 (Md. Ct. Spec. App. 1984).

136. *See supra* Section III.A.

137. *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 19-10, LAW ENFORCEMENT OPERATIONS, 110 (30 Sept. 1987) [hereinafter FM 19-10] ("MP policy specifies types of offenses that justify a high speed pursuit. Pursuit of an armed robbery suspect is normally warranted. The dangerous pursuit of traffic violators is much less justified."). At the U.S. Army Military Police School, new recruits are taught to conduct off-post hot pursuits only "when public safety is at great risk." Telephone Interview with Major James W. Smith, Instructor, Law Division, U.S. Army Military Police School (Jan. 26, 1999).

local authorities. Such an agreement could define those circumstances that will warrant an off-post pursuit, create communication channels to effect immediate reporting of a hot pursuit to local authorities, and establish procedures to minimize risk to the local populace. The agreement should also address the use of force and other extraordinary measures, such as roadblocks.

Obviously, when military law enforcement officials engage in a high-speed off-post pursuit, the risk of liability for the United States is high. To minimize the liability risks, officials must be trained to balance the need to apprehend the suspect (for example, will the suspect cause serious injury to others if he escapes?) against the risk of endangering the community by the chase itself. Once the decision to pursue is made, the official must know his capabilities and limits. At some point, the chase may become too risky, and the official must "back off." Finally, during the chase, the military law enforcement department headquarters must maintain radio communication with the pursuing official and, most importantly, ultimate control and authority to end the pursuit.

B. Response to an Off-Post Emergency[139]

This section reviews the authority of a military law enforcement official to respond to an off-post crime that is in progress. The official may personally observe the crime or be summoned for assistance. In either case, the crime is occurring outside the official's territorial jurisdiction. In this scenario, the two legal bases discussed above are inapplicable. The security of the installation is probably unaffected, so the commander's inherent authority to maintain law and order cannot be extended to warrant the off-post response. Moreover, without an independent military purpose,

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138. *See, e.g.*, Fort Knox Provost Marshal, Standard Operating Procedures, Emergency Vehicle Operation–Hot Pursuit (on file with author).

> Hot pursuit is justified only when the MP knows or has reasonable grounds to believe the suspect presents a clear and immediate threat to the safety of other motorists; has committed or is attempting to commit a serious felony; or when the necessity of immediate apprehension outweighs the level of danger created by the hot pursuit.

Id. At the U.S. Army Military Police School, newly appointed Army installation provost marshals are encouraged to establish this type of standard operating procedures for their departments. Telephone Interview with Lieutenant Colonel Stephen R. Haney, Law Division, U.S. Army Military Police School (Feb. 4, 1999).

the Military Purpose Doctrine will not protect the official from a potential Posse Comitatus Act violation.[140] In addition, the crime has occurred outside of the official's jurisdiction, and the hot pursuit doctrine only applies when the original crime occurs on post.[141]

This section concludes that the only legitimate legal justification for a response in this scenario is the common law doctrine of "citizen's arrest."[142] Several state courts have held that, where a police officer, who is outside of his territorial jurisdiction, observes or is summoned to stop a crime in progress, he may respond in the same manner that a citizen of that state may respond.[143] Thus, the fact that the officer lacks his official authority outside his jurisdiction will not invalidate the arrest.[144]

This section first studies the law of citizen's arrest and how it applies to the military law enforcement official. Next, the theory is tested against the Posse Comitatus Act to determine whether a violation may occur during an off-post response. Then, this section addresses potential criticisms of this theory; for example, liability issues will be explored to determine whether a responding official will risk personal liability. Finally, the sec-

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139. Reference to the off-post "emergency" should not be confused with the generally accepted constitutional exception to the Posse Comitatus Act, "Emergency Powers." This constitutional exception authorizes "prompt and vigorous [f]ederal action, including use of military forces, to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden . . . civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal governmental functions," and local and state authorities are unable to respond adequately. Employment of Military Resources in the Event of Civil Disturbances, 32 C.F.R. § 215.4c(1)(i) (1998). This exception applies only in extraordinary circumstances. Some examples include: "sudden and unexpected invasions or civil disturbances, including civil disturbances incident to earthquake, fire, flood, or other public calamity endangering life or federal property or disrupting federal functions or the normal processes of government." JA 221, *supra* note 13, para. 3-9. Furthermore, federal forces may not respond unless "duly constituted local authorities are unable to control the situation." AR 500-51, *supra* note 36, para. 3-4b(1).

140. *But see* DOD DIR. 5525.5, *supra* note 14, encl. 4, para. 1.2.1 (providing that actions taken for the "protection of DOD personnel" are permissible direct actions–within the scope of the Military Purpose Doctrine–that do *not* violate the Posse Comitatus Act).

Thus, if a military official responded to an attack on a service member, the independent military purpose avoids a violation of the Act. However, while this provision of the DOD Directive describes an *exception* to the Posse Comitatus Act, it does not provide a legal basis to conduct an arrest. In other words, the military official must have some legal basis, such as citizen's arrest authority, to conduct the arrest. The Military Purpose Doctrine is then applied only to permit what might otherwise be a violation of the Act.

141. *See supra* Section IV.A.

cion examines one potentially problematic form of off-post activity: responding to incidents occurring in off-post military housing areas.

1. The Citizen's Arrest

As noted earlier,[145] a law enforcement officer acting outside of his territorial jurisdiction acts beyond his official capacity and thus has no *official* power to arrest.[146] The officer does, however, possess any rights that are bestowed upon the citizens of that state, including the right to make a citizen's arrest. Each state authorizes its citizens to make some form of arrest,[147] whether by statute[148] or by common law.[149] While each state may differ as to the extent of a citizen's arrest authority, the common approach is to empower the citizen to arrest without a warrant for felonies

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142. There is one other legal basis, related to the commander's inherent authority, that may warrant an off-post response in a specific type of circumstance. If the crime involves the theft or destruction of government property, military officials may respond and assert police power pursuant to the commander's inherent authority to protect federal property. *See* Employment of Military Resources in the Event of Civil Disturbances, 32 C.F.R. § 215.4c(1)(ii) (authorizing "federal action, including the use of military forces, to protect federal property . . . when the need for protection exists and duly constituted local authorities are unable or decline to provide adequate protection").

Thus, if a military law enforcement official observes a civilian vandalizing a government vehicle outside the installation gates, and the local civil authorities are unable to respond, the official may travel off post and arrest the civilian. Furthermore, such action would be excepted from the Posse Comitatus Act as a legitimate military purpose. *See* DOD DIR. 5525.5, *supra* note 14, encl. 4, para. 1 2.1.5 (providing that "protection of DOD equipment is "permissible direct assistance"). This authority is limited, however, to the protection of government property, and will not apply in the typical off-post crime in progress.

143. *See, e.g.*, State v. Stevens, 603 A.2d 1203, 1206-07 (Conn. App. Ct. 1991) (listing and approving several cases where officers making warrantless arrests outside their jurisdictions were held to have lawfully acted with the authority of private citizens).

144. State v. O'Kelly, 211 N.W.2d 589, 595 (Iowa 1973) ("When the [Nebraska] officers came to Iowa, they ceased to be officers but they did not cease to be persons. 'An officer who seeks to make an arrest without warrant outside his territory must be treated as a private person.'").

145. *See supra* Section IV.A.2.

146. *See* People v. Marino, 400 N.E.2d 491, 494 (Ill. App. Ct. 1980) (recognizing common law rule that officers have "no power to make warrantless arrests outside the territorial limits of the political entity which appointed them to their office" unless an exception exists, such as "fresh pursuit" or "citizen's arrest" authority); Stevenson v. State, 413 A.2d 1340, 1343 (Md. 1980); State v. Slawek, 338 N.W.2d 120, 122 (Wisc. App. 1983); 6A C.J.S. *Arrest* § 53 (1975) ("An offense against the law is the justification for an arrest, and since the laws of one sovereignty have no extra-territorial operation, an offense against the laws of one state does not authorize an arrest therefor in another state.").

and misdemeanor breaches of the peace committed in his presence, and on probable cause for felonies that are committed outside his presence.[150]

Several courts have held that, when a police officer makes an arrest outside of his territorial jurisdiction, he acts as a private citizen, and the arrest will be deemed valid if made in accordance with the law of citizen's arrests for that jurisdiction.[151] In *Stevenson v. State*,[152] the Maryland Court of Appeals reviewed a case in which two Washington, D.C., police detectives were in Maryland on routine business when they observed a bank robbery in progress. They immediately responded by chasing two suspects for several city blocks, finally subduing them. At trial, the defendants unsuccessfully moved to suppress all evidence seized as fruit of an illegal arrest.[153] Finding that the officers were without statutory authority to arrest–as police officers–in Maryland, the court reviewed the common law of citizen's arrests in Maryland and held that the arrests were proper.[154]

When police officers conduct extraterritorial arrests under the auspices of citizen's arrest power, they nevertheless must comply with the Fourth Amendment protections against unreasonable searches and seizures. Normally, a private citizen's actions do not trigger the protections

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147. It is generally accepted that the validity of an arrest is determined by the law of the state where the arrest was made. United States v. Di Re, 332 U.S. 581, 589 (1948); Williams v. Adams, 436 F.2d 30, 32 (2d Cir. 1970).

148. *See, e.g.*, GA. CODE ANN. § 17-4-60 (1997) ("A private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge. If the offense is a felony and the offender is escaping or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion.").

149. In Maryland, for example, the Court of Appeals has set forth the common law requirements as follows:

> In Maryland, a private person has authority to arrest without a warrant only when (a) there is a felony being committed in his presence or when a felony in fact has been committed whether or not in his presence, and the arrester has reasonable ground (probable cause) to believe the person he arrests has committed it; or (b) a misdemeanor is being committed in the presence or view of the arrester which amounts to a breach of the peace.

Stevenson v. State, 413 A.2d 1340, 1345 (Md. 1980).

150. *See Stevenson*, 413 A.2d at 1345 (stating that this is the law on citizen arrests "generally accepted both in this country and in England since at least the late eighteenth century"); 5 AM. JUR. 2D *Arrest* § 55 (1995) ("[T]he common law accorded a private person extensive powers to arrest without warrant for felonies and breaches of the peace committed in his or her presence, and on probable cause for past felonies.").

of the Fourth Amendment, since constitutional protections only apply to the actions of governmental officials.[155] When, however, the private person "in light of all the circumstances of the case must be regarded as having acted as an 'instrument' or agent of the state," the Fourth Amendment will govern his actions.[156] Thus, although an officer is no longer "cloaked with the official authority of a police officer" when he leaves his jurisdiction, it would "be disingenuous to think that [the officer is] not acting as an agent or instrumentality of the police simply because he crossed the state line."[157] Thus, if an out-of-state police officer conducts a citizen's arrest in an illegal manner, such as an arrest based on insufficient probable cause, the exclusionary rule will apply.

On the other hand, just because the police officer is arresting based on a citizen's arrest theory does not mean he must "surrender the indicia of his authority" (such as his uniform, weapon, and badge) before making an arrest.[158] Thus, the officer may pursue a suspect in his police vehicle, and

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151. *See, e.g.*, United States v. DeCatur, 430 F.2d 365, 367 (9th Cir. 1970) (holding that a U.S. postal inspector had authority under California citizen arrest statute to effect a citizen arrest of a mail theft suspect, even though the postal inspector did not possess statutory arrest authority); State v. Stevens, 603 A.2d 1203, 1208 (Conn. App. Ct. 1991) (holding that police officers acting outside their territorial jurisdictions have the same authority to arrest as do private citizens); People v. Marino, 400 N.E.2d 491, 494 (Ill. App. Ct. 1980).

> [O]ur own research has disclosed an extensive line of cases from other states which uphold the validity of an extra-territorial arrest made by a police officer who lacked the official authority to arrest, where it is determined that a private person, acting in the same circumstances, would have been authorized by law to make a "citizen's arrest.

Id. Commonwealth v. Gullick, 435 N.E.2d 348, 351 (Mass. 1982) (holding that police officer effecting arrest outside jurisdiction does so as a private citizen and that such arrest is valid as a citizen's arrest); State v. Slawek, 338 N.W.2d 120, 121 (Wis. Ct. App. 1983) (holding that police officer acting beyond his bailiwick has no power to effect arrests, but that extensive line of authorities from several states validate an extraterritorial arrest as that of a private citizen if the state sanctions citizen arrests).

152. 413 A.2d 1340 (Md. 1980).

153. *Id.* at 1343.

154. *Id.* at 1344.

155. State v. Stevens, 603 A.2d 1203, 1208 (Conn. App. Ct. 1991) (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

156. Coolidge v. New Hampshire, 430 U.S. 443, 488 (1971), *quoted in Stevens*, 603 A.2d at 1208; *see* Commonwealth v. Gullick, 435 N.E.2d 348, 351 n.3 (Mass. 1982) ("Although the Fourth Amendment does not apply to private citizens, it applies in a case such as this, where the arresting citizen is acting as an agent or instrumentality of the police.").

he may show his badge or draw his weapon to effect the arrest. In *People v. Marino*,[159] the Appellate Court of Illinois upheld an arrest where Chicago police formed probable cause to arrest a suspect while they were conducting an investigation outside their territory. The officers asserted their "official authority," which was inapplicable outside their jurisdiction, to effect the arrest. The court held: "[A] warrantless arrest effected by a police officer who asserts official authority to arrest which he does not in fact have is nevertheless valid if an arrest made by a private person under the same circumstances would have been valid."[160]

Like other law enforcement officials, military officials have the legal authority to depart their installations and conduct citizen arrests.[161] Thus, the citizen's arrest authority provides the legal basis to respond to the "emergency response" scenario presented at the start of this section.[162] As long as the off-post criminal act is a felony or, in most states, a misdemeanor breach of the peace, the military official who observes it, or is requested to assist in preventing it, may respond. Based on the citizen's arrest theory, and assuming probable cause exists, the resultant arrest will be legal. Furthermore, when a response is legally warranted, the official may depart the federal jurisdiction and carry with him the necessary means available to effect the arrest, such as his uniform, badge, weapon, and squad car.

As a matter of policy, commanders will not want the "citizen's arrest" authority to serve as a ticket for military law enforcement officials to start asserting their power off post. The authority may be used only in extraor-

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157. *Stevens*, 603 A.2d at 1208. *See* M. BASSIOUNI, CITIZEN'S ARREST 33-34 (1977):

> If the [extraterritorial] arrest [by a government agent] was in violation of search and seizure standards, its results would be subject to the exclusionary rule, but if the arrest was valid then its consequences would be admissible. However, a governmental agent cannot operate outside his or her jurisdiction and benefit from a lesser legal threshold, seizing evidence by means of a search incidental to arrest which would not withstand constitutional scrutiny. Any contrary position would in fact restore the "silver platter doctrine," which at one time enabled federal and state officers to operate outside their jurisdictional authority and to avoid constitutional limitations on admissible evidence.

158. Phoenix v. State, 428 So. 2d 262, 266 (Fla. Dist. Ct. App. 1982), *aff'd*, 455 So. 2d 1024 (Fla. 1984).

159. 400 N.E.2d 491 (Ill. App. Ct. 1980).

160. *Id.* at 497.

dinary circumstances, when civilian authorities are unavailable. The execution must, of course, be in accordance with applicable state law; this mandates that military law enforcement officials are trained in the citizen's arrest laws of the surrounding state. Furthermore, the abuse of "citizen's arrest" authority risks "pervading" the activities of civil law enforcement and may violate the Posse Comitatus Act. The next subsection, therefore, tests the citizen's arrest against the Posse Comitatus Act.

2. The Citizen's Arrest and the Posse Comitatus Act

This subsection analyzes whether or not a citizen's arrest that is conducted by a military law enforcement official will violate the Posse Comitatus Act. When military authorities respond to an off-post crime in

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161. In a recent case, the Fifth Circuit Court of Appeals applied "citizen's arrest" authority to uphold an *on-post* arrest at Fort Hood, Texas. United States v. Mullin, No. 97-50904, 1999 U.S. App. LEXIS 12092, at *8 (5th Cir. June 10, 1999). The court held that, although military police were not "peace officers" under Texas law, they still possessed all the arrest powers of a "private citizen." *Id.* Furthermore, military police conducting a "citizen's arrest" could lawfully interrogate the suspect and conduct a search incident to the arrest. *Id.* at *14-*16. The court did not specifically limit its analysis to on-post arrests. The *Mullin* holding would certainly apply off the installation, where military law enforcement officials have, as a minimum, the arrests powers of a private citizen.

The authority of military law enforcement officials to conduct citizen arrests is acknowledged in several forms. *See, e.g.*, Aid to Civil Authorities and Public Relations, Apprehension and Restraint, 32 C.F.R. § 503.1 (1998):

> All members of the Department of the Army having [sic] the ordinary right and duty of citizens in the maintenance of the peace. Where, therefore, a felony or a misdemeanor amounting to a breach of the peace is being committed in his presence, it is the right and duty of every member of the military service, as of every civilian, to apprehend the perpetrator.

See also AR 195-2, *supra* note 26, para. 3-21 ("Nothing in this regulation is intended to restrict . . . the personal authority of special agents under various state laws concerning citizen arrests."); FM 19-10, *supra* note 134, at 108:

> All members of the military have the ordinary right of private citizens to assist in maintenance of the peace. This includes the right to apprehend offenders. Citizen's arrest power is defined by local law. In exercising this power, care should be taken not to exceed the right granted by law.

162. The citizen's arrest authority also provides a legal basis for conducting an arrest when in "hot pursuit" of a civilian who committed an offense on post. *See supra* note 110 (discussing the overlap of this theory with the common law doctrine of extraterritorial arrest authority when in hot pursuit).

progress, the independent military purpose of protecting the installation–a principle exception to the Act[163]–is not existent.[164] Courts have, however, found other factors to validate the law enforcement activities of military officials. Courts have generally held that, where the involvement does not "constitute the exercise of regulatory, proscriptive, or compulsory military power," does not amount to "direct active involvement in the execution of the laws," and does not "pervade the activities of civil authorities,"[165] no violation will be found.

Normally, no violation occurs when military personnel enforce civil laws on their own initiative as private citizens.[166] When, however, the private person "in light of all the circumstances of the case must be regarded as having acted as an 'instrument' or agent of the military,"[167] a court is unlikely to find that the action taken cannot be attributed to the military. Thus, although the "citizen's arrest" doctrine is applied to legalize the extraterritorial arrest itself for purposes of the Fourth Amendment, the

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163. *See supra* Section III (describing the Military Purpose Doctrine as an exception to the Posse Comitatus Act). *See, e.g.*, Hayes v. Hawes, 921 F.2d 100, 103 (7th Cir. 1990); Harker v. State, 663 P.2d 932, 936 (Alaska 1983).

164. In certain specific circumstances, however, the Military Purpose Doctrine will apply. First, *DOD Directive 5525.5* provides that actions taken for the "protection of DOD personnel" are permissible direct actions–within the scope of the Military Purpose Doctrine–that do *not* violate the Posse Comitatus Act. DOD DIR. 5525.5, *supra* note 14, encl. 4, para. 1.2.1. Thus, if a military official responded to an attack on a service member, the independent military purpose avoids a violation of the Act. This article, however, will assume that the victim is a civilian or–*more likely*–that the military official cannot determine the status of the victim.

Second, if the crime involves the theft or destruction of government property, a military law enforcement official may lawfully respond. *DOD Directive 5525.5* provides that "protection of DOD equipment" is a permissible direct action that does not violate the Act. DOD DIR. 5525.5, *supra* note 14, encl. 4, para. 1.2.1.5. Thus, if an official observes a civilian vandalizing a government vehicle outside the installation gates, and the local civil authorities are unable to respond, the official may travel off post and arrest the civilian. This authority is limited, however, to the protection of government property, and will not apply in the typical off-post crime in progress.

165. United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (setting out the three established tests to determine when military involvement constitutes more than just indirect assistance); *see also* United States v. Kahn, 35 F.3d 426, 431 (9th Cir. 1994); United States v. Hartley, 678 F.2d 961, 978 n.24 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

166. Major Clarence I. Meeks III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 126 (1975) ("It is not sufficient that military personnel be 'volunteers,' they must clearly be acting on their own initiative and in a purely unofficial and individual capacity."); *see generally* Porto, *supra* note 14, at 298-99 (listing and summarizing cases where military personnel were held to have been assisting civil authorities on their own initiative, as private citizens).

doctrine does not necessarily excuse such action under the Posse Comitatus Act when the military official retains his status as an *instrumentality of the military.*

Nevertheless, both federal and state courts have held that, when military law enforcement officials assume no greater authority than would a private citizen assisting civil law enforcers, no violation will be found. Common cases are when military investigators act as undercover agents in off-post drug trafficking investigations.[168] In other words, when a military official's actions are "like" those of a private citizen's–even though he or she is performing normal law enforcement duties–the Posse Comitatus Act will not be violated. Thus, when a military official immediately responds to an off-post criminal incident to which civil authorities are unable to assist, he is doing no more than a private citizen would be authorized to do.

A citizen's arrest is unlikely to "pervade" the activities of civil law enforcement officials.[169] Such responses will be infrequent, isolated events. In the typical case, the military will assist only when civil authorities have not yet responded–and the emergency circumstances necessitate quick action. Only where the military's actions equate to excessive intervention in the activities of civil authorities will a Posse Comitatus Act violation be found.[170] For example, if military law enforcement officials, relying on "citizen's arrest" authority, began to patrol the adjacent areas off the installation and search out criminal activity, this pervasion of civil authority would violate the Act.

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167. Coolidge v. New Hampshire, 430 U.S. 443, 488 (1971), *quoted in* State v. Stevens, 603 A.2d 1203, 1208 (Conn. App. Ct. 1991); *see also* Commonwealth v. Gullick, 435 N.E.2d 348, 351 n.3 (Mass. 1982) ("Although the Fourth Amendment does not apply to private citizens, it applies in a case such as this, where the arresting citizen is acting as an agent or instrumentality of the police.").

168. *See, e.g.*, Hayes v. Hawes, 921 F.2d 100 (7th Cir. 1990) (finding no violation where Navy investigator's involvement in a drug investigation was minimal and served the same function as a civilian cooperating with the police).

169. Ensuring military law enforcement officials do not "pervade" the activities of civil authorities is essential to avoiding a Posse Comitatus Act violation. *See, e.g.*, United States v. Bacon, 851 F.2d 1312, 1313 (11th Cir. 1988) (concluding that, because military participation in drug investigation "did not pervade the activities of civilian officials, and did not subject citizenry to the regulatory exercise of military power," it did not violate the Act).

170. *See, e.g.*, Taylor v. State, 645 P.2d 522 (Okla. Crim. 1982) (finding that military involvement was excessive and thus violated the Posse Comitatus Act when military investigator actively participated in a drug investigation and subsequently arrested the suspect "not as a private citizen, but instead . . . solely under the authority of his military status").

Courts also look to whether the military officials acted on their own initiative, or whether their actions were intended primarily to aid civil authorities. Two courts have found violations of the Act when the military acted *in response to specific requests* for assistance by civil authorities.[171] In these cases, the states received more than incidental benefits—in fact, they were employing the power of the military to enforce civil laws, a clear violation of the Act. Such is not the case when civil authorities are unavailable, and a military official provides immediate response, on his own initiative, to an off-post criminal incident.

Finally, the Act itself requires "willful" employment of the military to enforce the law.[172] This language necessarily implies planned action, where civil or military officials make a conscious determination to use military power *in the place of or in assistance to* civil law enforcement. The immediate response to an off-post criminal emergency can clearly be distinguished from the "willful" use of military investigators to deliberately plan and effect a law enforcement operation, such as an off-post drug bust.

In sum, it appears that military law enforcement officials will not risk violating the Posse Comitatus Act when responding, in the form of a "citizen's arrest," to an off-post crime in progress.

3. Criticisms of the Citizen's Arrest Approach

This subsection addresses some of the criticisms that have been or will be asserted against the "citizen's arrest" approach to off-post law enforcement action.

a. Unreasonable to Expect Military Law Enforcers to Understand Citizen's Arrest Laws

Some commentators are skeptical of reliance on the citizen's arrest theory on the basis that military law enforcement officials, who are transferred from one installation to another, cannot be expected to learn the citizen's arrest rules of each state in which they are assigned.[173] Since the

171. *See supra* note 120; *see also* Harker v. State, 663 P.2d 932, 937 (Alaska 1983) (reviewing all cases where Posse Comitatus violations were found and stating that, in *all* cases finding a violation of the Act, "the military conduct was at the request of civilian law enforcement").

172. 18 U.S.C.A. § 1385 (West 1998).

law of arrest is determined by the state where the arrest takes place,[174] each state is likely to have a different rule, and would, according to these commentators, place an unreasonable burden on military law enforcement officials if expected to act pursuant to various states' citizen's arrest provisions.[175] The risk is that an official will be confused and exceed the citizen's arrest authority for the particular state.[176]

There is some validity to this criticism. In the Fifth Circuit case of *Alexander v. United States*,[177] for example, a U.S. postal inspector's "citizen's arrest" was held illegal because the inspector did not comply with the Texas requirement of immediate removal of the suspect to a magistrate or peace officer.[178] All evidence seized incident to the arrest was thus suppressed pursuant to the exclusionary rule.[179]

While the actions of a private citizen normally do not implicate the protections of the Fourth Amendment, the actions of a law enforcement official outside his jurisdiction–even though conducting a citizen's arrest–generally must comply with such protections.[180] The risk is real, therefore, that a military law enforcement official will exceed the limits or fail to

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173. *See, e.g.*, Military Police Authority, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 1984/2412 (3 Aug. 1984):

> Given that we have installations in many states and those states often have different and confusing laws relating to "citizen's arrests," we place an unreasonable burden on military police who are transferred from one installation to another, if we expect them to act pursuant to each state's "citizen's arrest" authority . . . . [W]e should cease publishing official reliance on any such authority . . . .

See also Captain Darrell L. Peck, *The Use of Force to Protect Government Property*, 26 MIL. L. REV. 81, 118-19 (1964).

174. It is generally accepted that the validity of an arrest is determined by the law of the state where the arrest was made. United States v. Di Re, 332 U.S. 581, 589 (1948); Williams v. Adams, 436 F.2d 30, 32 (2d Cir. 1970).

175. *See* Military Police Authority, Op. Admin. L. Div., OTJAG, Army, DAJA-AL 1984/2412 (3 Aug. 1984).

176. *Id.*

177. 390 F.2d 101 (5th Cir. 1968).

178. *Id.* at 106-07. The facts in *Alexander*, however, warrant special scrutiny. In *Alexander*, the inspectors misled the suspect as to the purpose of the investigation when questioning him and gaining his consent to search. *Id.* at 107. The Court expressed concern regarding "detention, interrogation, and trickery by every self-appointed detective." *Id.* at 109.

179. *Id.* at 108.

meet the minimum requirements of a citizen's arrest statute, thus rendering the arrest illegal.

The obvious response to this criticism is that there is no other option. In the context of an emergency response to an off-post incident,[181] other than citizen's arrest authority, military officials have no statutory or common law authority to conduct arrests of civilians outside the federal installation's jurisdiction.[182] Unless the Department of Defense is prepared to specifically prohibit military law enforcement officials from engaging in such arrests, these officials must be expected to know the rules.[183] For the time being, at least, the Army's policy encourages the execution of citizen's arrests, declaring it the "duty" of every service member, as a citizen, to apprehend perpetrators who commit felonies or misdemeanors amounting to breaches of the peace.[184] Furthermore, military law enforcement officials are already expected, in accordance with regulations and training manuals, to understand the local rules on citizen's arrest.[185]

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180. *See supra* Section IV.B.1 (describing how law enforcement officials acting outside their territories must still comply with the Fourth Amendment, since they remain agents of the Government).

181. This statement pertains only in the context of the emergency response to a crime in progress. As described in Section IV.A.2, *supra*, there is a separate, common law basis for pursuing a lawbreaker off post in hot pursuit.

182. As previously noted, there may exist legal bases to act in such specific circumstances as when the victim of the crime is a service member, *see supra* notes 137, 161; or when the object of the crime is government property, *see supra* notes 138, 161.

183. Although the laws of various states may differ, they will generally follow the common law rule, with minor alterations. It is hard to imagine that the task of learning the local state's rules upon each reassignment would be an unreasonable burden. If we can expect military law enforcement officials to understand the rules of search and seizure, certainly we can expect them to learn the rules of citizen's arrest. Furthermore, because of the Assimilated Crimes Act (18 U.S.C. § 13), which assimilates state criminal laws into the United States Code on installations with exclusive federal jurisdiction, law enforcement officials must be familiar with numerous state criminal laws, including all the relevant state traffic laws, upon each assignment to an exclusive jurisdiction federal installation.

184. Aid to Civil Authorities and Public Relations, Apprehension and Restraint, 32 C.F.R. § 503.1 (1998):

> All members of the Department of the Army having [sic] the ordinary right and duty of citizens in the maintenance of the peace. Where, therefore, a felony or a misdemeanor amounting to a breach of the peace is being committed in his presence, it is the right and duty of every member of the military service, as of every civilian, to apprehend the perpetrator.

b. A Professional Law Enforcement Official Cannot Conduct a "Citizen's" Arrest

Some commentators claim that the citizen's arrest doctrine loses applicability when the citizen is a military law enforcement official performing his trained profession.[186] Thus, on the one hand, a service member who is off duty and acting as a private citizen may come across a crime in progress and exert citizen's arrest authority to arrest the offender. In this case, the soldier's military status is incidental to his being at the scene of the crime. On the other hand, when a military investigator responds to the scene, his military status is not incidental to his presence at the scene. Rather, it is the very reason he is called there; he carries his official military status with him. Thus, it is illogical that he can claim "citizen's arrest" authority.

This argument apparently confuses the application of "citizen's arrest" in the criminal procedure context with "citizen's arrest" in the context of tort law, specifically the agency relationship of master-servant. The purpose of asserting the citizen's arrest authority in a response to an off-post crime in progress is to comply with Fourth Amendment protections against unreasonable seizures; without statutory or other legal authority, the only *lawful* arrest will be one pursuant to the state's rule for citizen's arrests. But, in fact, the official never severs his relationship with the sovereign that appointed him. Several courts have held that, while a police officer who is outside of his territorial jurisdiction may lawfully conduct an arrest pursuant to the local state's citizen's arrest law, the officer still retains his status as an agent of the government.[187] In other words, the

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185. *See, e.g.*, AR 195-2, *supra* note 26, para. 3-21 ("Nothing in this regulation is intended to restrict . . . the personal authority of special agents under various state laws concerning citizen arrests."); FM 19-10, *supra* note 134, at 108 ("All members of the military have the ordinary right of private citizens to assist in maintenance of the peace. This includes the right to apprehend offenders. Citizen's arrest power is defined by local law. In exercising this power, care should be taken not to exceed the right granted by law.").

186. *See, e.g.*, Military Detention of Civilians for Certain Offenses Committed Within an Air Force Installation, Op. JAG, Air Force, No. 60 (3 Oct. 1991) ("Because Air Force Security Police act within their official capacity while performing their assigned duties, they may not make a so-called 'citizen's arrest' during the time they are performing official duties.").

187. Coolidge v. New Hampshire, 430 U.S. 443, 488 (1971), *quoted in* State v. Stevens, 603 A.2d 1203, 1208 (Conn. App. Ct. 1991); *see* Commonwealth v. Gullick, 435 N.E.2d 348, 351 n.3 (Mass. 1982) ("Although the Fourth Amendment does not apply to private citizens, it applies in a case such as this, where the arresting citizen is acting as an agent or instrumentality of the police.").

officer can be on official business, as an instrument of the state, and *still conduct a citizen's arrest.* To hold otherwise would necessitate that the officer shed himself of all indicia of his official position–squad car, uniform, badge, handcuffs, and weapon–*and* go "off-duty," before conducting an arrest. Courts have generally refused to adopt this argument.

Those who claim an "official cannot act as a citizen" are looking through the lens of "servant-master" rules, a concept that is applicable in tort law. Their point, apparently, is that an officer cannot temporarily sever his agency relationship to effect an arrest as a "citizen" when his involvement in the arrest is based on his agency relationship in the first place. Advocates of the citizen's arrest theory, however, acknowledge this inability to sever the agency relationship–they recognize that the officer remains an instrument of the state–but the official relationship does not negate reliance on the "citizen's arrest" authority to effect a lawful arrest outside the military installation.

c. Military Law Enforcement Officials will be Exposed to Personal Liability

Another criticism of the citizen's arrest theory is that it may expose individual military law enforcement officials to personal tort liability if they exceed the permissible limits of a citizen's arrest statute.[188] Under the Federal Tort Claims Act, when an official's conduct causes injury, such as a false arrest, the United States waives sovereign immunity as long as the official was acting "within the scope of his employment" at the time.[189] Critics of the citizen's arrest theory warn that such conduct is outside the

188. *See, e.g.*, Peck, *supra* note 170, at 118-19.

189. 28 U.S.C.A. § 1346(b) (West 1998). The Act generally prohibits suits for damages caused by intentional torts, such as assault and battery and false arrest. *Id.* § 2680. Congress has, however, provided an exception: The Federal Tort Claims Act (FTCA) waives sovereign immunity for assault, battery, false imprisonment, and false arrest when committed by federal law enforcement officers. The "federal law enforcement officer" is defined as an officer of the United States "who is empowered by law to execute searches, to seize evidence, and to make arrests for violation of [f]ederal law." *Id.* § 2680(h). The federal official must have been acting within the scope of his employment. For purposes of the FTCA, military law enforcement officials have been held to be "federal law enforcement officers." *See* Kennedy v. United States, 585 F. Supp. 1119, 1123 (D.S.C. 1984) (involving a claim of false arrest under the FTCA, where the court held: "Military police are law enforcement officers who possess power to make arrests for violations of Federal law. While they normally confine their activities to enforcement of military law, they do possess all powers that civilian law enforcement officers have, *on* military property.").

scope of normal duties and may even violate the Posse Comitatus Act; thus, the conduct will be considered outside the scope of employment. These officials would therefore not be entitled to protection by the United States against a claim, and may be exposed to personal tort liability for their actions.

One case that lends weight to this argument is *Wrynn v. United States*,[190] where an Air Force helicopter pilot, while assisting a sheriff in searching for an escaped prisoner, struck a tree and injured some bystanders. In a suit based on the Federal Torts Claims Act, the court held that the pilot had violated the Posse Comitatus Act by assisting civilian law enforcement, and was thus acting outside the scope of his employment.[191] The United States could therefore not be held liable. With the government's sovereignty not waived, the injured party's only redress would be against the pilot and crewmembers in their private capacities.

The *Wrynn* case, however, is inapplicable where a military law enforcement official responds, on his own initiative, to an off-post crime in progress. In *Wrynn*, the local authorities *requested military assistance* in enforcing the law; a clear violation of the Posse Comitatus Act was thus found.[192] In the context of independently responding to an off-post crime in progress, however–when civil authorities are unavailable–there is no violation of the Act.[193]

Again, the criticism confuses the application of "citizen's arrest" in the criminal procedure context with "citizen's arrest" in the context of tort law, specifically the agency relationship of master-servant. When a military law enforcement official responds to an off-post crime in progress, the citizen's arrest doctrine legalizes the resulting arrest for Fourth Amendment purposes–but the official never severs his agency relationship with the military.[194] He will thus be found to have acted within the scope of his employment and will be protected from suit pursuant to the FTCA.[195] Furthermore, it would be disingenuous for the military departments to publish guidance essentially authorizing citizen's arrests[196] and then claim that a military law enforcement official exceeds his authority when he conducts

190. 200 F. Supp. 457 (E.D.N.Y. 1961).

191. *Id.* at 465.

192. *Id.*

193. *See supra* Section IV.B.2 (describing how courts have generally held that, when military law enforcement officials act on their own initiative and not at the request of civil authorities, no violation will be found).

194. *See supra* Section IV.B.3.b.

one. Only if a military department or local commander specifically prohibited employing citizen's arrest authority to respond to an emergency in progress would such conduct be outside the scope of employment.[197]

4. The Citizen's Arrest in an Off-Post Housing Area

This subsection examines the assertion of military law enforcement power in off-post housing areas. In these areas, the United States will likely have only a "proprietorial interest." This means that the federal government has acquired some right or title of ownership to the area, but has

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195. *See* RESTATEMENT (SECOND) OF AGENCY § 228 (1958):

> (1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master, and
>
> (d) if force is intentionally used by the servant against another, the force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond time or space limits, or too little actuated by a purpose to serve the master.

196. *See, e.g.*, Aid to Civil Authorities and Public Relations, Apprehension and Restraint, 32 C.F.R. § 503.1 (1998):

> All members of the Department of the Army having [sic] the ordinary right and duty of citizens in the maintenance of the peace. Where, therefore, a felony or a misdemeanor amounting to a breach of the peace is being committed in his presence, it is the right and duty of every member of the military service, as of every civilian, to apprehend the perpetrator.

Id. See also AR 195-2, *supra* note 26, para. 3-21 ("Nothing in this regulation is intended to restrict . . . the personal authority of special agents under various state laws concerning citizen arrests."); FM 19-10, *supra* note 134, at 108 ("All members of the military have the ordinary right of private citizens to assist in maintenance of the peace. This includes the right to apprehend offenders. Citizen's arrest power is defined by local law. In exercising this power, care should be taken not to exceed the right granted by law.").

197. Of course, the official cannot respond to *any* emergency. Responding to a phone call requesting assistance to stop a crime in progress 30 miles from the installation would obviously be outside the scope of employment. Again, this article is concerned with the scenario whereby the military official either observes the crime just outside the gate or is requested to respond to an incident in close proximity to the gate.

obtained no legislative authority.[198] With legislative authority, the federal government may enact legislation pertaining to the area, including criminal statutes.[199] Where the government holds only a proprietorial interest, it has essentially the same rights as any landowner.[200] The state retains primary civil and criminal jurisdiction and may exert police power over the area.[201] The authority of the nearby installation commander to provide security and enforce the law in these areas is, thus, superseded by state and local civilian authorities. The authority of military law enforcement officials, therefore, will be minimal.

The same general rules of citizen's arrest, as addressed above, will apply when responding to crimes in progress within off-post housing areas.[202] But application of this doctrine becomes much more complex in this context. Most significant is the temptation for commanders and law enforcement officials to be drawn into an enforcement role where they have no inherent authority.[203] The temptation is compounded when local authorities take a "hands off" approach to patrolling in an area that they view as the military's responsibility.[204]

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198. JA 221, *supra* note 13, para. 2-5.

199. *Id.*

200. *Id.*

201. *Id.*

202. As previously discussed, there is another legal basis–related to the commander's inherent authority–that may warrant an off-post response in a specific type of circumstance. If the crime involves the theft or destruction of government property, military officials may respond and assert police power pursuant to the commander's inherent authority to protect federal property. *See* Employment of Military Resources in the Event of Civil Disturbances, 32 C.F.R. § 215.4c(1)(ii) (1998) (authorizing "federal action, including the use of military forces, to protect federal property . . . when the need for protection exists and duly constituted local authorities are unable or decline to provide adequate protection").

Thus, if a military law enforcement official is notified that a civilian is in the process of vandalizing a government-owned building in an off-post housing area, and the local civil authorities are unable to respond, the official may travel off post and arrest the civilian. Furthermore, such action would be excepted from the Posse Comitatus Act as a legitimate military purpose. *See* DOD DIR. 5525.5, *supra* note 14, at encl. 4, para. 1.2.1.5 (providing that "protection of DOD equipment is "permissible direct assistance"). This authority is limited, however, to when local authorities cannot or will not respond. In most cases involving damage to government property in an off-post area, civil authorities may likely respond just as quickly as the military authorities.

203. Telephone Interview with John J. Perryman, III, Special Agent, Office of the Inspector General, Department of Defense, Criminal and Investigative Police and Oversight Division (Jan. 19, 1999) (referring to informal surveys he has conducted, revealing the extensive amount of involvement military law enforcement officials have in off-post housing areas within the DOD).

204. *Id.*

Extensive involvement in law enforcement within these areas places the commander and his law enforcement officials at great risk of violating the Posse Comitatus Act. Several federal and state courts have held that, where the military "pervades the activities of civil authorities," a violation will be found.[205] Routine patrols and frequent actions to enforce the law in these areas may likely lead to violations of the Act.

Certainly, there is a military purpose involved in ensuring the security of off-post housing areas. But, as stated earlier in this article, the further removed from the federal installation, the lesser the military's interest, and the less pervasive the conduct of military law enforcement may be. For example, while military investigators may permissibly investigate off-post drug sources and act as undercover agents during sting operations, they may not take active part in the search or arrest of civilian suspects. The military's necessity is tempered by the fact that, in such operations, they have the time to coordinate in advance with civil authorities that have the prerogative to enforce the law in their jurisdictions.[206] In an off-post housing area, the Military Purpose Doctrine would permit routine patrols for the legitimate purposes of protecting property and ensuring the health, general safety, and welfare of the military inhabitants. Beyond that goal, however, the conduct of military law enforcement risks violating the Posse Comitatus Act.

In some circumstances, military law enforcement officials may exert their authority–including conducting an arrest–without risk of violating the Act. For example, if a military policeman lawfully on patrol in a housing area suddenly observes a man assaulting another person, he may immediately respond, subdue the attacker, and detain him long enough to transfer him to civil authorities. Of course, unless the attacker was a service member, his authority would be that of an ordinary citizen in the surrounding state.

One federal circuit case is particularly analogous to this scenario. In *Applewhite v. United States Air Force*,[207] the Tenth Circuit reviewed whether the civilian wife of an airman could sue for a breach of her constitutional rights when she was arrested by Air Force special investigators

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205. *See supra* Section IV.A.1; *see also* United States v. Hartley, 678 F.2d 961, 978 n.24 (11th Cir. 1982); United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (setting out the three established tests to determine when military involvement constitutes more than just indirect assistance); United States v. Kahn, 35 F.3d 426, 431 (9th Cir. 1994).

206. *See supra* Section III.C.

207. 995 F.2d 997 (10th Cir. 1993).

during a sting of an off-post drug operation. The investigators had set up a "buy-bust" operation, whereby any military personnel purchasing drugs were to be immediately arrested. No civil authorities were present, since the investigation focused only on military personnel. At some point in the operation, Airman Applewhite brought his wife along for a purchase of drugs. An arrest followed, during which a pat-down search of Mrs. Applewhite, conducted for safety purposes, revealed the presence of illegal drugs. The investigators arrested her, handcuffed her, and transported her back to their office on the Air Force base, where they proceeded to interrogate and partially strip-search her. Civil authorities were contacted, but declined to accept jurisdiction, so she was released.

In her lawsuit, Mrs. Applewhite alleged that the investigators had violated the Posse Comitatus Act.[208] The court acknowledged the Military Purpose Doctrine and held that the sting operation itself was lawful since there was an independent military purpose.[209] The court then held that, given the *lawful presence and conduct* of the investigators at the scene, their actions upon discovering the criminal conduct of Mrs. Applewhite did not constitute a "willful use of any part of the Air Force as a posse to execute civil laws, nor did military law enforcement officers go outside the confines of a military installation to arrest a civilian."[210] In other words, the military investigators had not intended to enforce civil laws against Mrs. Applewhite or any other civilian–they responded to this unexpected criminal act no differently than an ordinary citizen would be authorized to do. Finally, the court held that the investigators were not required to let her go just because she was a civilian–they could detain her for a reasonable period of time to conduct some investigation and to inquire as to whether civil authorities had an interest in the case.[211]

The holding in *Applewhite* applies to the situation where a military policeman, patrolling an off-post housing area, observes an assault in progress. Lawfully present at the scene in accordance with the Military Purpose Doctrine, his response to the sudden emergency is not a willful use of the military to enforce the law, nor is apprehension of the attacker the reason for his presence in the area.

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208. *Id.* at 999.
209. *Id.* at 1001.
210. *Id.*
211. *Id.*

Another challenge to military law enforcement involvement in off-post housing areas is the "under color of office" doctrine, which might invalidate an otherwise lawful citizen's arrest. Under this doctrine, when a law enforcement officer acts outside his jurisdiction–and thus, pursuant to the surrounding state's citizen's arrest law–he may not use the power of his office to "gather evidence or ferret out criminal activity not otherwise observable."[212] In other words, although the officer need not discard the "indicia of [his] position" when making an arrest–such as his uniform, badge, weapon, and handcuffs–he may not use his position to discover evidence of a crime to which an ordinary citizen would not be privy.[213] Any evidence obtained by the unlawful assertion of official authority will be suppressed.[214]

This doctrine poses a particular challenge to military law enforcement officials engaged in patrols of off-post housing areas. While the citizen's arrest authority, described earlier, may warrant a response when the official observes or is asked to respond to a crime in progress, the "under color of office" doctrine severely limits the authority to *investigate* possible criminal activity.[215] For example, if a bystander tells a patrolling military official that the civilian husband of a service member violently attacked his wife three hours earlier, the official may not use his authority as a military law enforcement official to gather evidence about the case and then arrest the man.[216] Rather, he must defer to the jurisdiction of civil authorities.

The temptation to exert a military law enforcement "presence" in off-post housing areas necessitates that commanders and provost marshals understand the parameters of military authority off post. While there is no prohibition against conducting patrols in these areas, such involvement

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212. State v. Phoenix, 428 So. 2d 262, 266 (Fla. App. 1982) ("Pursuant to the color of law doctrine, police officers acting outside their jurisdiction but not in fresh pursuit may not utilize the power of their office to gather evidence or ferret out criminal activities.").

213. *Id.* ("When officers outside their jurisdiction have sufficient grounds to make a valid citizen's arrest, the law should not require them to discard the indicia of their position before chasing and arresting the fleeing felon.").

214. *Id.*

215. This should not be confused with the authority to investigate off-post crimes having an adverse impact *on* the installation–such as the investigation of a drug dealer who sells to soldiers. *See supra* Section III.C. (describing off-post investigatory authority). This section is concerned with crimes having a direct adverse impact only within the off-post housing area.

216. Thus, he may not "canvas" the neighborhood, knocking on doors and representing himself as a military policeman to obtain evidence. He may not use his position to gain access to restricted areas to gain evidence.

places military law enforcement officials in precarious positions, where their sense of duty and an inclination to "ferret out" criminal activity in these areas could violate the Posse Comitatus Act. To avoid violating the Act, installation law enforcement departments should establish clear guidelines on the authority of military officials to act. They should also establish clear support agreements with local law enforcement agencies to ensure that civilian authorities will respond when needed.

IV. Conclusion

The purpose of this article has been to examine the authority that military law enforcement officials may exercise over civilians both on and off the federal military installation. The primary focus has been to determine the legal bases permitting these officials to conduct warrantless arrests of civilian lawbreakers.

The laws of the United States strictly limit the role of the military in civil law enforcement. Not only has Congress not provided military law enforcement officials with statutory arrest authority over civilians, but it also has enacted the Posse Comitatus Act, a criminal prohibition against the use of military personnel to enforce civil laws. As this article demonstrates, however, the military inevitably must assert some law enforcement authority over civilians. As a minimum, military installation commanders have the responsibility to maintain law and order on their installations and to protect the occupants thereof. Without statutory arrest authority, military law enforcement officials must rely on other legal bases to assert authority over civilians. Meanwhile, these officials must ensure that their actions do not exceed the boundaries of permissible conduct and risk violating the Posse Comitatus Act.

This article presented two scenarios that military law enforcement officials are likely to encounter while serving at a federal military installation: (1) a civilian lawbreaker, being chased in "hot pursuit," crosses outside the boundary of federal jurisdiction (in the opening scenario to this article, Sergeant Smith climbs over the gate fence and pursues a fleeing felon into an off-post trailer park); and (2) a military official, within a close response range, personally observes–or is requested to respond to–a crime in progress off the installation. In each scenario, the law enforcement official must make an instantaneous decision about the extent of his or her authority. This article clarifies the boundaries of this authority.

The principle legal basis for military law enforcement authority over civilians is the inherent authority of the installation commander to maintain law and order on the installation. Military law enforcement officials, as the commander's agents, may arrest civilian lawbreakers who threaten law and order on the installation. Because their actions achieve an independent military purpose, and only incidentally benefit civil authorities, the Military Purpose Doctrine excepts this exertion of authority from the prohibitions of the Posse Comitatus Act. The commander's inherent authority and the Military Purpose Doctrine also permit certain off-post law enforcement activities aimed at civilians, such as undercover drug investigations. Since certain off-post crimes have an adverse impact *on* the installation, military investigators, pursuant to the commander's inherent authority, may travel off-post to investigate or conduct non-pervasive operations. Their authority, however, is generally limited to indirect, passive participation and does not include arrests and searches of civilians. "Direct" exertions of authority, such as arrests and searches, must be performed by local authorities.

But when faced with either of the two scenarios presented above, military law enforcement officials will have no time to coordinate with local authorities. Moreover, their conduct will inevitably be *direct*–such as an arrest and a search incident to arrest–and may involve the use of force. These officials must have a clear understanding of what they can and cannot do. This article has therefore presented various legal bases to warrant a response.

In the context of pursuing a civilian off the installation, the commander's inherent authority is transferred off-post. Under the common law doctrine of extraterritorial authority while in "hot pursuit," the military law enforcement official who observes a felony occur on post may pursue the lawbreaker off the installation. Once outside the boundaries, the official assumes the same powers as those possessed by local police. Furthermore, because the pursuit of a felon off the installation serves a valid military purpose, the Military Purpose Doctrine excepts the conduct from the prohibitions of the Posse Comitatus Act.

In the context of an emergency response to an off-post crime in progress, the military official may employ "citizen's arrest" authority. If the official personally observes–or is requested to help prevent–a felony or a misdemeanor breach of the peace, he may travel off post and conduct an arrest in the same manner as any citizen. Although the Military Purpose Doctrine likely will not apply (since there is no independent military pur-

pose achieved), the citizen's arrest will not violate the Posse Comitatus Act because it will not "pervade" the activities of civil law enforcement.

The clarification of the legal bases to conduct arrests is not intended to advocate an expansion in the role of military law enforcement officials. These officials derive their authority from the installation commander, and their actions should accomplish no more than needed to maintain law and order on the installation. Any significant expansion of this role runs the risk of violating the Posse Comitatus Act.

Nevertheless, there are times when military officials must assert their authority beyond the jurisdictional boundaries of the installation. Once they open the gate, however, their authority changes, and as the military's interest decreases, so does their authority. Without proper training and clear guidelines on the extent of their authority, military law enforcement officials–and their supervisors–run the risk of violating the Posse Comitatus Act. Particularly in such areas as off-post housing developments, where loyalties to military personnel and family members run up against the clear jurisdictional authority of civil law enforcement, military officials must understand the parameters of their authority. This article shows that, in many circumstances, military law enforcement officials do in fact possess arrest authority; it also shows that this power is limited. With proper training and guidance, however, military officials will find they have sufficient authority to carry out their missions of maintaining law and order on the installation and protecting military personnel and property.

THE REGULATION OF "BODY ART" IN THE MILITARY: PIERCING THE VEIL OF SERVICE MEMBERS' CONSTITUTIONAL RIGHTS

MAJOR L.M. CAMPANELLA[1]

[T]he world will not stop and think–it never does, it is not its way; its way is to generalize from a single sample.[2]

Mark Twain

I. Introduction

A service member's body is never exclusively his own–that is readily apparent. The military can dictate both physical restrictions and physical requirements such as hair length,[3] body fat percentages,[4] physical training standards,[5] consumption of alcohol or drugs,[6] even forbidding sexual acts between consenting adults.[7] It seems then, to make perfect sense, that the military would be able to dictate legitimately whether military members

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2. Jim Zwick, *Mark Twain* (visited Sept. 7, 1999) <http://marktwain.miningco.com> (providing additional quotations of Mark Twain).

3. U.S. DEP'T OF ARMY, REG. 670-1, para. 1-8a, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (1 Sept. 1992) [hereinafter AR 670-1].

4. U.S. DEP'T OF ARMY, REG. 600-9, THE ARMY WEIGHT CONTROL PROGRAM (1 Sept. 1986).

5. U.S. DEP'T OF ARMY, FIELD MANUAL 21-20, PHYSICAL FITNESS (28 Aug. 1985).

6. U.S. DEP'T OF ARMY, REG. 600-85, ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM (21 Oct. 1988).

7. UCMJ art. 125 (1998) (prohibiting sodomy).

can poke holes in, brand, or place other tattoo "art" on their bodies. The issue, however, is not that straightforward.

Given how effectively the United States military operates, it is safe to assert that the vast majority of service members adhere to the restrictions placed on them, regardless of whether they understand the reasoning behind the policies. Soldiers realize that they have surrendered their bodies (and a good portion of their free will) to the defense of the United States Constitution.[8] Military members understand the sacrifices of military service.

Despite the majority's willingness to adhere to the rules, the military should still articulate to service members and to the public why various restrictions are necessary.[9] This is true in the area of "body art"–especially in light of potential Constitutional infringements on military members' personal affairs or private rights. Explaining why restrictions are neces-

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8. *See* 10 U.S.C.A. § 502 (West 1998) (stating the enlisted oath of office); 5 U.S.C.A. § 331 (West 1998) (stating the officer oath of office). *See also United States Army* (visited Feb. 16, 1999), <http://members.aol.com/sapper11t/index.html> (citing the Army oath of enlistment, the Army oath of officer for officers, the Army Code of Conduct, and the Soldier's Creed).

9. The military frequently informs soldiers and the public why certain infringements are necessary. *See, e.g.*, Message, 080433Z Mar 99, Dep't of Army, DAPE-HR-L, subject: Army Immunization Policy (AR 600-20, para 5-4) (8 Mar. 1999) (explaining the immunization policy) [hereinafter Army Immunization Policy]. The revision of the immunization policy provides:

> [C]ommanders will ensure that soldiers are continually educated concerning the intent and rationale behind both routine and theater-specific or threat-specific military immunization standards. Immunizations required by *AR 40-562* or other legal directive may be given involuntarily . . . [t]he intent of this authorization is to protect health and overall effectiveness of the command, as well as the health of the individual soldier. In cases where involuntary immunization is considered, the following limitations apply. (A) Actions will not be taken to involuntarily immunize soldiers. If a soldier declines to be immunized the commander will: (I) ensure the soldier understands the purpose of the vaccine, (II) [e]nsure that the soldier has been advised of the possibility that disease may be naturally present in a possible area of operation or may be used as a biological weapon against the United States or its allies, (III) [e]nsure the service member is educated about the vaccine and has been able to discuss any objections with medical authorities.

Id.

sary gives our institution legitimacy and a sense of fairness. It also makes our policy decisions legally defensible.

It is difficult to take issue with the propriety of the military services dictating the wear of the military uniform or the proscription of openly visible "body art"[10] while on duty. The premise of this article is not to advocate that the military should completely abandon its policy against certain forms of body art. This article does not advocate that the military should permit soldiers with extremist-type viewpoints to display symbols of their beliefs on their bodies. The prohibition against displaying racist, extremist, or gang-related symbols in the form of body art, in almost all circumstances, is necessary to maintain good order, discipline, and readiness.[11]

The underlying theme of this article is, instead, to explore more closely the Army's body art policy and its legality; to compare the other military services' policies to the Army's policy; and to examine whether the Army policy, as written, is justified, necessary, and practical.[12] This article explores the notion that the Army's new "body art" policy simply goes too far.

II. Body Art and the Service Policies

A. What is "Body Art?"

"Body art" is one of the nation's newest fashion trends.[13] It seems as though no sector of society is immune from the craze–young and old,

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10. *See infra* notes 16, 17, 18 and accompanying text defining body art.

11. *See* Major Walter M. Hudson, *Racial Extremism in the Army*, 159 MIL. L. REV. 1 (1999).

12. This article will not explore other more invasive body arts such as sub-skin implants (implanting objects beneath the skin to cause a raising of the skin with the underlying appearance in the shape of the implant) or scarification (cutting skin with the intention of leaving a scar in the shape of the wound). The military does not address these body alterations in the new Army body art policy. Arguably, however, these other techniques of self-expression may be regulated by the military in a similar fashion that other forms of body art are now regulated, even though not specifically provided for under the current regulation. Further, the Army's body art policy does not include other body modifications that may appear "natural" to an onlooker such as facelifts, rhinoplasty, liposuction, breast augmentation and reduction, and hair transplants, to note a few. Some of these body modifications are not only authorized by the Army, but are also performed by the Army. *See generally* U.S. DEP'T OF ARMY, REG. 40-3, MEDICAL, DENTAL, AND VETERINARY CARE (15 Feb. 1985).

women and men, educated and uneducated,[14] civilians and military.[15] "Body art" is a term used to connote the different methods a person may use to change the natural appearance of his body through various "additions." "Body art" includes such things as tattooing,[16] body piercing,[17] and branding.[18] In all its forms, body art exists in the military.[19]

There are an infinite number of reasons why people obtain body art.[20] A person could be motivated by the look, the feel, or the personal meaning behind the body art.[21] Whatever the reason for obtaining it–two things are clear. First, the meaning behind the body art, whatever its form, is personal

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13. Body art has become so popular that in 1997, the American Body Art Association (ABAA) was founded. The mission of the ABAA is to educate tattooists and piercers in proper sterile, aseptic techniques; educate clientele for proper after-care of new body art; provide a liaison between practitioners and lawmakers to ensure the continued growth of our industry without undue regulation; provide practitioners with training and certification in aseptic techniques, basic business principles, to allow a forum to speak freely on all issues related to the industry; assist practitioners in determining applicable laws and regulations in their respective locale. *See American Body Art Association* (visited Feb. 22, 1999) <http://body-art.com/abaa1.html>. *See generally* Karam Radwan, *You've Got WHAT Put in Your Tongue?*, LEICESTER MERCURY (Pa.), Oct. 9, 1998, at 12 (exploring why "more and more young people are having holes punched in them for fashion"); David Horn Jr., *Yuma Teens Withstand Pain For Popular Body Piercings*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Sept. 23, 1998.

14. One piercing parlor is even listed in the Library of Congress *Who's Who, 1998*. "Tribal Ways" tattooing parlor received this listing because of local press coverage as experts in the field. *See, e.g.*, *Tribal Ways* (visited Mar. 15, 1999) <http//www.tribal-ways.com/tribal.html>; WOMEN'S SPORTS AND FITNESS, Mar. 1999, at 4 (containing an advertisement for Bacardi Rum). The advertisement displays a woman holding a mixed drink. The woman's sweater is short enough to show her bare stomach. Her naval is pierced with a small gold hoop. The caption in the advertisement reads: "Banker by day. Bacardi by night." *Id.*

15. *See* Gemma Tarlach, *Tattoos, Body Piercing Becoming More Popular*, PRESS JOURNAL (Pa.), Jan. 1, 1999, at C11. *See also* Lisa Hoffman, *That Better Be a Bullet in Your Nose, Soldier*, PHILADELPHIA DAILY NEWS, June 12, 1998; AIR FORCE NEWS, *Ellsworth Airman Hospitalized With Infection After Body Piercing*, May 26, 1998.

16. Tattooing is a process dating back thousands of years by which skin is marked or colored with a needle by indelible ink. The result is limited only by what one's imagination can dream up–perhaps a picture, a design, a word or phrase. A tattoo can be placed virtually anywhere on the body. *See* Craig Taylor, *Tattoo* (visited Jan. 19, 1999) <www.miavx1.muohio.edu/~taylorw1/history.html>.

17. Body piercing is a form of body decoration whereby "metal rings or other items are attached through holes made in the skin." Body piercing is a relatively simple and inexpensive process. The cost of a piercing can range from $10 for an earlobe to $65 for a piercing on the genital region. The jewelry can range in price from $15, depending on the type of metal used to make the jewelry. *See Passage Piercing* (visited Jan. 16, 1999) <www.interlog.com/~passage/piercing/main.html>.

to its possessor.[22] Second, and more importantly in the military context, "body art" is open to the interpretation of those who see it. It is, in part, on this second basis, that the Army began regulating body art.

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18. Branding is scarification by applying a heated material (usually metal) to the skin, making a serious burn that eventually becomes a scar. Some have experimented with branding using extremely cold materials (liquid nitrogen). *See* Shannon Larratt, *BME Branding/Cutting/Scarring FAQ* (visited Mar. 15, 1999) <http://www.bme.freeq.com/scar/scar-faq.html#1-3>. *See also* Joan Whitely, *Branded For Life*, LAS VEGAS REV. J., Oct. 4, 1998, at 1J. Branding is ordinarily done through one of two methods: the laser branding method or the more traditional "striking" method. The laser method involves "burning the skin with a pencil-like instrument that emits an electrical current." The striking method involves "heating a thin strip of metal, bent into the desired shape, to as hot as 1800 degrees" and striking the skin numerous times until the desired mark is made. Branding is the most permanent form of body art. *See generally* Antoinette Alexander, *Crossroads-Brand New Fad-It's Hot; Will It Last?*, ASHBURY PARK PRESS (N.J.) Sept. 20, 1998, at AA1.

The French branded convicts on their shoulder with iris petals tied by an encircling band to represent that they were ostracized from civilized society. In England, King Henry the Eighth branded thieves on the cheek with an "S" to indicate they were slaves and outcasts forever. *See generally* Lonnae O'Neal Parker, *Brand Identities–Some Call Burning Flesh a 'Rite of Passage'–Others Say It's An Ugly Throwback To Slavery*, WASH. POST, May 11, 1998, at D1.

19. *See, e.g.*, Senior Master Sergeant Jim Katzaman, *Body Art: The Color Behind the Black and White Rules*, AIR FORCE NEWS, June 18, 1998, at 1 (observing tattoos, brands, and other body decorations have all been present on military members bodies).

20. *See generally* Shannon Larratt, *BME Branding/Cutting/Scarring FAQ* (visited Mar. 15, 1999) <http://www.bme.freeq.com/scar/scar-faq.html#1-2> (providing a discussion as to the reasons why people obtain body art).

21. *See* Mike Cable, *Where Do You Want Your Tiger?*, LONDON TIMES, Oct. 17., 1998, at A-12 (exploring the reasons why people obtain body art). Some people obtain body art because it marks a transition in life, such as a birthday or the death of a loved one. For others, it could have been the result from a juvenile moment of drunken thoughtlessness. The symbolism of the body art may give the possessor a range of emotions from pride to shame or regret. *See also* Jeff Ristine, *One Time Neo-Nazi Gives Tips On Fighting Hate*, SAN DIEGO UNION-TRIB., Sept. 26, 1998, at B-1 (exploring an ex-soldier's story about his entry into a five-year program to remove 29 racist tattoos from his entire body–including swastikas, an "SS" lightening bolt, an Aryan soldier, and other symbols of hate).

22. In some cases, the meaning behind a person's body art may not be obvious. Only the person who obtained the body art knows for certain why they obtained it and what it means to them. Onlookers may guess what the symbolism represents (and in some cases be correct), however, sometimes body art has a private hidden meaning that is personal to the possessor.

B. Regulating "Body Art" in the Military

1. Army Policy

Only very recently did the Army begin regulating "body art." The Army's concern began, in part, as a reaction to an incident in December, 1995, outside Fort Bragg, North Carolina,[23] when an Army soldier (allegedly having ties to white supremacist extremists) randomly shot and killed a black couple.[24] The soldier allegedly committed the killings to earn a skinhead tattoo of a spider web on his elbow.[25] Given the depraved and disgraceful nature of the crime, the Army as an institution, as well as the Fort Bragg command, felt obligated to respond quickly and with a strong message–a message that would indicate that the Army would not tolerate even the thought of "extremist" affiliation from its members.[26] Shortly thereafter, the Army's first tattoo inspection policy was born.[27]

The 82d Airborne Division Commanding General at Fort Bragg directed that all commanders conduct physical inspections of their soldiers as part of their routine health and welfare program.[28] The command designed the policy to identify tattoos, body markings, or other symbols representing racist beliefs, extremist organizations, or gang affiliation on

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23. *See* Scott Mooneyham & Marc Barnes, *Skinhead Tattoo Linked to Race-Related Killings–Court Documents, Testimony Describe Soldiers Alleged Activities*, FAYETTEVILLE OBSERVER-TIMES, Dec. 13, 1995, at B-2 (describing the killings). The article noted that in skinhead terminology, earning the spider-web tattoo meant killing a black person or a gay person.

24. Jim Burmeister was one of the soldiers tried for the killings. His co-conspirator in the murders, Randy Meadows, testified at trial that Burmeister "joked about earning a tattoo that some skinheads wear to show they have killed a black person." Similarly, Malcolm Wright, another co-conspirator in the murders, alleged to have been with Burmeister during the murders, asserted that "in certain skinhead groups, members wear a spider-web tattoo if they had killed a black person." *See* Mooneyham, *supra* note 23. Only very recently did the Army begin regulating "body art." The Army's concern began, in part, as a reaction to an incident in December 1995, outside Fort Bragg, North Carolina, when an Army soldier (allegeding to have ties to white supremacist extremists) randomly shot and killed a black couple. The soldier allegedly committed the killing to earn a skinhead tattoo of a spider web on his elbow. Given the depraved and disgraceful nature of the crime, the Army as an institution, as well as the Fort Bragg command, felt obligated to respond quickly and with a strong message–a message that would indicate that the Army would not tolerate even the thought of "extremist" affiliation from its members. Shortly thereafter, the Army's first tattoo inspection policy was born. *See also* Marc Barnes, *Evening of Killing Recounted–Meadows Recalls Shots*, FAYETTEVILLE OBSERVER-TIMES, Feb. 14, 1997, at B-2.

25. *See* Barnes, *supra* note 24.

the soldier's body not covered by the physical training uniform.[29] If a commander found a potentially extremist-type tattoo, the commander was directed to interview the soldier and inquire into the meaning of the symbol and take appropriate action to address the situation.[30] Some soldiers met the new inspection system with disapproval.[31]

The initial inspections at Fort Bragg identified a large number of soldiers with tattoos, but only a small number of soldiers with alleged racist, extremist, or gang-related tattoos.[32] After concluding the initial inspec-

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26. Memorandum, Commander, XVIII Airborne Corps and Fort Bragg, AFZA-HR-EO, subject: Extremist Groups (13 Dec. 1995). In this memorandum, the then XVIII Airborne Corps Commander, Lieutenant General Henry H. Shelton, the current Chairman of the Joint Chiefs of Staff, reemphasized his command policy regarding extremist organizations stating that "extremists are totally inconsistent with the responsibilities of military service. Active participation by any soldier in this command is prohibited. We are committed to the principles of fair and equitable treatment for all soldiers and family members within XVIII Corps." *Id.* The memorandum directed that commanders, managers, and supervisors immediately conduct chain teaching to educate soldiers on extremist groups. This memorandum noted that on 12 December 1995, the Secretary of the Army conducted a news conference to address the Fayetteville shootings. *Id.* The Secretary of the Army directed that the taped briefing be forwarded for viewing to all officers, noncommissioned officer (NCO) leaders, down to platoon level throughout the Army. On 20 December 1995, the 82d Airborne Division Commander, then Major General George Crocker, promulgated a memorandum supplementing the XVIII Corps Commander's 13 December 1995 memorandum regarding extremism. Major General Crocker's memorandum reemphasized the Army's command policy to prohibit soldiers from actively participating in extremist organizations and again, directed chain teaching by all commanders. The memorandum further advised:

> [S]oldiers who are identified as members of extremist organizations should be counseled and warned that such membership is incompatible with the values of military service. A full range of judicial, non-judicial, and administrative options are available to the commanders of soldiers whose behavior constitutes a threat to the discipline and good order of the Army.

Id.

27. *See* Policy Letter JA 96-03, Office of the Staff Judge Advocate, 82d Airborne Division, AFVC-JA, subject: Inspections for Racist or Gang Symbols/Tattoos (26 Mar. 1998) [hereinafter Policy Letter 96-03] (on file with the author). The results of these inspections were to be reported to the XVIII Airborne Corps higher headquarters, including negative findings. *See also* Electronic Mail from Colonel Thomas Turner, Chief of Staff, XVIII Airborne Corps, to Sean Byrnes and then-Lieutenant Colonel Robert McFetridge, Staff Judge Advocate, 82d Airborne Division (22 Mar. 1996) (on file with author).

28. Policy Letter 96-03, *supra* note 27. The policy directed that the 82d Replacement Detachment Commander conduct inspections of incoming soldiers as a routine part of the replacement activities for newly assigned personnel.

tions, the 82d Airborne Commander rescinded and replaced the directive mandating inspections with a more permissive inspection policy.[33]

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29. *Id.* The new policy stated that during these inspections soldiers would be required to remove their physical training shirts for inspection. Soldiers would be inspected by leaders of the same sex and the inspections would be conducted in as non-intrusive a manner as possible, with appropriate privacy. There was some confusion about how to implement the policy when it was first promulgated. At least one infantry company commander made his soldiers strip naked to check for tattoos. This resulted in some additional, more specific guidance to commanders. Interview with Major Walter Hudson, Professor, The Army Judge Advocate General's School (Feb. 8, 1999) [hereinafter Hudson Interview]. Major Hudson served as the former Chief of the Military Justice Division, 82d Airborne Division. *See* Information Paper, Lieutenant Colonel Robert McFetridge, Office of the Staff Judge Advocate, subject: Guidance for Commanders On Inspection of Soldiers for Racist, Gang, or Extremist Tattoos (28 Mar. 1996) (indicating the concern about the proper methodology for conducting inspections). Lieutenant Colonel McFetridge noted that "if done wrong, tattoo inspections have great potential for creating serious legal issues." *Id.* The information paper provided additional guidance to commanders and instructed commanders to notify the staff judge advocate office for recommendations on decisions concerning bars to reenlistment.

30. Policy Letter 96-03, *supra* note 27. A commander's response could range from counseling to administratively discharging the soldier for racist or gang-related activities. The policy letter directed commanders to educate themselves on the symbols indicative of involvement in or affiliation with racist beliefs, extremist organizations, or gangs, by consulting with the Division Equal Opportunity Officer. If the symbol was obviously "extremist" or gang related, the commander was to first counsel the soldier and inquire into potential extremist affiliations. If the commander determined that the soldier was an extremist, the commander could bar the soldier from re-enlisting or administratively discharge him depending on the circumstances. If the soldier's tattoo was not obviously racist or extremist, the commander was supposed to ask the soldier what the tattoo meant. If the commander's suspicions were confirmed, the commander was to counsel the soldier that the display of the symbol or involvement in extremist activities is incompatible with military service. The commander was then instructed to take appropriate action in accordance with *Army Regulation (AR) 600-20*. *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 4-12 (30 Mar. 1988) [hereinafter AR 600-20]; 82D AIRBORNE DIVISION, PAM. 27-2, 82D AIRBORNE DIVISION LEADER'S GUIDE ON IDENTIFYING AND COMBATING EXTREMIST AND GANG-RELATED ACTIVITY (12 Feb. 1997) (providing guidance to commanders to recognize and combat extremist and gang-related activities) [hereinafter FORT BRAGG GUIDE ON IDENTIFYING EXTREMISM]. A list of possible extremists was on file at the 82d Airborne Division Office of the Staff Judge Advocate. *See* Hudson Interview, *supra* note 29. Major Hudson advised that copies of the extremist handbook developed at Fort Bragg were requested by several staff judge advocate offices including at least one Marine staff judge advocate office. Note, however, that the problems with using such a handbook are obvious. First, the handbook surely does not contain all the tattoos/symbols that indicate extremist or gang-related affiliations. Many soldiers with racist or extremist tattoos that are not contained in the handbook are not found to be in violation of the policy because the meaning of their tattoo is not known. Second, once the soldiers learn of the tattoos/symbols that are on the prohibited list, other more non-mainstream symbols for their causes may be used to indicate their affiliations and thus skirt the Army policy.

The 82d Airborne Division commander later took command of Fort Lewis and I Corps and instituted a similar tattoo inspection policy.[34] The Fort Lewis commanders, like the commanders at Fort Bragg, conducted a post-wide tattoo inspection after the policy was first promulgated.[35] As a result of the inspection, the command found no soldiers who possessed racist or gang-related tattoos.[36]

The Army as an institution also responded to the killings at Fort Bragg. In early 1996, the Secretary of the Army formed the Task Force on

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31. *See* Paul Woolverton, *Skin Deep: Soldiers Respond To Tattoo Inspections*, FAYETTEVILLE OBSERVER-TIMES, Apr. 12, 1996, at A-22. The article noted that over 14,500 soldiers were inspected at Fort Bragg. Some soldiers asserted that the policy was "unconstitutional and an overreaction on the part of the 82d Airborne." *Id.* One soldier was quoted in the article as saying "the military is making a bigger mess of it than they have to" and they are inappropriately focusing on people's skin instead of their actions. *See also* Scott Mooneyham, *Bragg Inspects Tattoos–All 82d Troops To Be Examined*, FAYETTVILLE OBSERVER-TIMES, Apr. 11, 1996, at A-12.

32. *See* Information Paper, Lieutenant Colonel Robert McFetridge, Staff Judge Advocate, 82d Airborne Division, subject: 82d Airborne Division's Tattoo Inspection Results, 2 May 1996 (on file with author) [hereinafter Results Information Paper]. The information paper indicated that four soldiers were identified through the division inspections. The command investigated the soldiers' wearing the prohibited tattoos and determined that those soldiers were involved in racist or gang-related activities. The information paper indicated that as a result of the investigation, two soldiers were administratively separated and two were barred from re-enlisting. *See* Hudson Interview, *supra* note 29. Major Hudson indicated that the commanders found numerous tattoos on the soldiers' bodies. Commanders did not know what many of the tattoos symbolized or meant. This led the 82d Airborne Division Office of the Staff Judge Advocate to seek out the meanings of many tattoos. The Office of the Staff Judge Advocate kept the names of persons with such tattoos on file until the nature of their tattoo was known. *Id.*

33. *See* Policy Letter JA 96-06, Colonel Thomas Turner, Chief of Staff, 82d Airborne Division, AFVC-JA, subject: Inspections for Racist or Gang Symbols/Tattoos (20 May 1996) [hereinafter Policy Letter 96-06]. *See* Memorandum, Colonel Thomas Turner, Chief of Staff, 82d Airborne Division, AFVC-CS, subject: Tattoo Inspection Policy (14 May 1996) [hereinafter Memorandum Tattoo]. The new policy allowed commanders some discretion as to whether to inspect soldiers for improper tattoos. The memorandum provided a more permissive tattoo inspection policy to monitor or respond to indicators that a unit might be developing an unhealthy equal opportunity climate and to ensure that a framework exists for conducting such inspections. The author of the memorandum noted that "[they] found exactly what [they] thought [they] would find, and what [they've] been saying all along–the vast majority of paratroopers in this division are proud professionals who have little patience or tolerance for extremists . . . ." The new policy continued to require the replacement detachment to inspect new soldiers arriving at Fort Bragg before allowing them to report to their units. *See also* Policy Letter JA 96-06, Colonel Karl W. Johnson, Chief of Staff, 82d Airborne Division, AFVC-JA, subject: Inspections for Racist or Gang Symbols/Tattoos (15 July 1997) (providing the current policy). The memorandum changed in format and signature approval. No other modifications to the policy were made.

Extremist Activities to evaluate whether the Army had a problem with extremism among its members and, if so, whether the Army should revise its policies.[37] The Task Force eventually determined that there was "minimal evidence of extremism in the ranks," yet it recommended that the

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34. Memorandum, Commander, Lieutenant General G.A. Crocker, AFZH-GA, subject: Extremist Group Involvement (19 June 1997), [hereinafter Extremist Group Involvement Memorandum]. This inspection policy was slightly broader in scope than the Fort Bragg policy in that it provided the commanders with guidance to look for "tattoos or *other ornamentation* that present a threat to military fitness, good order, and discipline" (emphasis added). *See* The Associated Press, *Former Bragg Head Orders Tattoo Check For 19,000*, NEWS & OBSERVER, RALEIGH (N.C.), Aug. 1, 1997. *See also* Interview with Major Mike Smidt, Professor, The Army Judge Advocate General's School (Feb. 8, 1999) [hereinafter Smidt Interview]. Major Smidt served as the Chief of Criminal Law Division at Fort Lewis, Washington, from July 1996 through July 1997. Major Smidt indicated that one possible reason for the institution of the Fort Lewis policy was because the headquarters for the white supremacist organization "Aryan Nation" is located in Haydon Lake, Idaho, very near to Fort Lewis and because of other supremacist activities in the Northwest area of the United States. The commanding general did not want to take any chances about a similar racist incident occurring at Fort Lewis as did at Fort Bragg. *Id.*

35. The Fort Lewis command issued catalogs of various prohibited tattoos commanders were to look for. The catalog depicted examples of racist or extremist tattoos such as neo-Nazi swastikas, SS thunderbolts, blue birds, spider webs on elbows, three-leaf clovers and skulls, and the iron cross. Commanders could obtain additional examples of tattoos from the Corps staff. *See* COMMANDER, LIEUTENANT GENERAL GA CROCKER, AFZH-GA, COMBATING EXTREMISM AT FORT LEWIS AND I CORPS, A GUIDEBOOK FOR COMMANDERS (10 June 1997). The guidebook was based on Fort Bragg's published guidance on identifying extremists. FORT BRAGG GUIDE ON IDENTIFYING EXTREMISM, *supra* note 30.

36. Telephone Interview with Major Ben Kash, Chief of Administrative Law, Fort Lewis, Washington (Feb. 8, 1999) [hereinafter Kash Interview]. *See also* Smidt Interview, *supra* note 34. Both Major Kash and Major Smidt said that one alleged extremist soldier was identified before the Fort Lewis command instituted the inspection policy. They also indicated that the local command's request to administratively separate that soldier under the Secretary of the Army's authority to discharge a soldier for the good of the service later was rejected. Major Smidt indicated that the separation packet on that soldier was rejected by the Assistant Secretary of the Army for Manpower and Reserve Affairs (ASA (M&RA)) as deficient in supporting evidence. Based on the ASA (M&RA) rejection of the separation, the soldier was retained on active duty. After the initial post-wide inspection, the Fort Lewis commander instituted a discretionary inspection policy and mandated that only the replacement detachment conduct ongoing inspections of incoming soldiers. Extremist Group Involvement Memorandum, *supra* note 34. The 82d Airborne Division commander later took command of Fort Lewis and I Corps and instituted a similar tattoo inspection policy. The Fort Lewis commanders, like the commanders at Fort Bragg, conducted a post-wide tattoo inspection after the policy was first promulgated. As a result of the inspection, the command found no soldiers who possessed racist or gang-related tattoos..

37. DEP'T OF ARMY, REPORT, THE SECRETARY OF THE ARMY'S TASK FORCE ON EXTREMIST ACTIVITIES: DEFENDING AMERICA'S VALUES (21 Mar. 1996) [hereinafter TASK FORCE ON EXTREMIST REPORT]. *See* Anti-Defamation League, *ADL Calls Army Report A Step In Right Direction* (visited Feb. 20, 1999) <www.adl.org/presrele/DiRaB_41/2697_41.html>.

Army begin screening at initial entry for extremists and other hate group influences.[38] The Task Force identified tattoos as a means of extremist identification.[39]

On 11 June 1998, the Army's Office of the Deputy Chief of Staff for Personnel (DCSPER) promulgated several changes to the Army's uniform regulation.[40] Among those changes was the Army's new "body art" policy prohibiting body piercing[41] and prohibiting tattoos and brands prejudicial to good order and discipline or detracting from a soldierly appearance.[42]

The Army's body art policy led to many practical questions from the field regarding policy implementation.[43] The policy was vague on many points, such as how to determine prohibited tattoos, what to do with soldier

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38. *See* TASK FORCE ON EXTREMIST REPORT, *supra* note 37, at 9, 34. The Task Force found that "[g]ang related activities appear to be more pervasive than extremist activities." *Id. See also* Robert Burns, *Army Should Screen For Supremacists, Panel Says*, DETROIT NEWS, Mar. 22, 1996, at A-12.

39. TASK FORCE ON EXTREMIST REPORT, *supra* note 37, at 27. The report states: "[K]nowledge of tattoo patterns is important for medical personnel involved in the accession process due to the proclivity for members of some extremist groups to get tattoos as part of their initiation or other organizational rituals." *Id.* Possessing tattoos was already a regulatory ground upon which to reject recruits from admission into the Army, though the guidance was somewhat vague. U.S. DEP'T OF ARMY, REG. 40-501, STANDARD OF MEDICAL FITNESS, para. 2-35 (27 Aug. 1995) [hereinafter AR 40-501]. *Army Regulation 40-501* provides that "[t]attoos that will significantly limit effective performance of military service" could be a basis for rejection from military. The regulation did not explain what tattoos might fall into the category of "limiting effective military service." *See* Message, 050607Z Aug. 97, Dep't of Army, DAPE-HR-PR, subject: Separation of Soldiers from Initial Entry Training (IET) for Tattoos (Aug. 1997). In August 1997, Headquarters Department of the Army, Office of the Deputy Chief of Staff for Personnel, Human Resources Directorate, promulgated guidance to Army Training and Doctrine Command (TRADOC). In turn, TRADOC was to provide the guidance to military entrance processing stations as guidance was needed to address the problem of incoming enlistees possessing body art. The guidance provided:

> [B]efore separation of any new enlistee, commanders should review the current policy of AR *670-1*, paragraph 1-8d., hygiene and body grooming tattoos. Commanders should base IET separation decisions on whether or not soldiers tattoos affect the wear of their uniform "so as not to detract from a soldierly appearance." Tattoos, such as those on the soldiers hands or ankles, should not mean automatic separation, but should be evaluated based on the tattoos size, color, and or design.

Id.

violations, and whether the policy applied retroactively.[44] The Army tried again.

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40. Message, 051601Z Jun 98, Dep't of Army, DAPE-HR-PR, subject: Wear and Appearance of Army Uniforms and Insignia (5 June 1998) [hereinafter June 98 Wear and Appearance Message]. *See* AR 670-1, *supra* note 3. *See also* Telephone Interview with Master Sergeant (MSG) Debra Wylie, Headquarters Department of the Army, Office of the Deputy Chief of Staff for Personnel (ODCSPER), Human Resources Directorate, Uniform Policies Officer (Mar. 19, 1999). During the major command (MACOM) sergeants' major conference in July 1997, some sergeants' major raised concerns about soldier body piercing and tattooing. *Id.* As a result of those discussions, an ODCSPER Process Action Team (PAT) was assembled to consider recommendations on possible body art policies. *Id.* In August 1997, the PAT formulated the initial policy and presented it to the DCSPER. The PAT recommendations formed the basis for the uniform policy changes promulgated in June 1998. The primary reason for instituting the policy was to "maintain uniformity of appearance." *Id.*

41. June 98 Wear and Appearance Message, *supra* note 40. The new policy provides in pertinent part:

> No attaching, affixing or displaying objects, articles, jewelry or ornamentation to or through the skin while in uniform, in civilian clothes while on duty, or in civilian clothes off duty on any military installation or other places under military control, except for earrings for females as outlined paragraph 1-14c, *AR 670-1*.

Id.

42. *Id.* The new policy guidance states:

> Visible tattoos or brands on the neck, face or head are prohibited. Tattoos on other areas of the body that are prejudicial to good order and discipline are prohibited. Additionally, any type of tattoo or brand that is visible while wearing a Class A uniform and detracts from a soldierly appearance is prohibited.

Id. The June 1998 tattoo policy supercedes the tattoo policy stated in paragraph 1-8d, *AR 670-1* that provided:

> Soldiers are expected to maintain good daily hygiene and wear their uniforms so as not to detract from the overall military appearance. Tattooing in areas of the body, (i.e., face, legs) that would cause the tattoo to be exposed while in Class A uniform, detract from a soldierly appearance.

See AR 670-1, *supra* note 3.

43. *See, e.g.*, Telephone Interview with Lieutenant Colonel Claude Wood, Headquarters Department of the Army, Office of the Deputy Chief of Staff for Personnel, Chief of the Human Resources Directorate (ODSPER-HR) (Feb. 16, 1999) [hereinafter Wood Interview].

44. June 98 Wear and Appearance Message, *supra* note 40.

In August 1998, the Army published a second message, attempting to clarify the original change to the uniform regulation.[45] It rescinded the old, male-earring standard[46] and allowed for female soldiers to wear earrings on the installation while on duty in civilian attire.[47] The message left the same issues previously noted unresolved.

In December 1998, the Army again published additional guidance on the new body art policy.[48] This guidance gave more breadth to the policy. The guidance stated that the tattoo policy did not contain a "grandfather clause" that would allow exceptions for those members who obtained tattoos before the policy was promulgated.[49] The December 1998 guidance provided criteria for commanders to determine prohibited tattoos and what to do in response to a violation.[50] The message stated that examples of violations may include tattoos that: (1) show an alliance with extremist orga-

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45. Message, 241710Z Aug 98, Dep't of Army, DAPE-HR-PR, subject: Wear and Appearance of Army Uniforms and Insignia, AR 670-1 (7 Aug. 1998) [hereinafter August 98 Clarifying Message].

46. *Id.* The August 1998 guidance regarding the June 1998 change to *AR 670-1* states that male soldiers are prohibited from wearing earrings on post, whether on duty or off duty. The Army's old earring policy for males stated that male soldiers were not authorized to wear any type of earring when in uniform or when in civilian clothes on duty. Thus, the old, male-earring policy allowed for the wear of earrings off duty and on post in civilian clothes. *See* AR 670-1, *supra* note 3, para. 1-14c.

47. August 98 Clarifying Message, *supra* note 45. In August 1998, the Army published a second message, attempting to clarify the original change to the uniform regulation. It rescinded the old, male-earring standard and allowed for female soldiers to wear earrings on the installation while on duty in civilian attire. The message left the same issues previously noted unresolved.. In accordance with *AR 670-1*, paragraph 1-13B, females could wear approved earrings while in uniform. *Army Regulation 670-1* provides that females on duty in civilian attire may wear earrings in accordance with the uniform regulation (small, spherical, unadorned and made of either gold, diamond, pearl, or silver) unless the commander provided otherwise. *See* AR 670-1, *supra* note 3, para. 1-13b (containing the old, male-earring policy).

48. Message, 310609Z Dec 98, Dep't of Army, DAPE-HR-PR, subject: Administrative Guidance to Army Tattoo Policy in Accordance With AR 670-1 (31 Dec. 1998) [hereinafter December 98 Administrative Guidance Message].

49. *Id. See* Wood Interview, *supra* note 43. The ODSPER-HR stated that he is responsible for promulgating policy concerning the wear of the Army uniform. Additional guidance is necessary to help commanders in the field interpret the initial body art policy promulgated in June 1998. *Id.* There is a potential for difficulties with trying to enforce two standards under a grandfather clause, especially in circumstances where a superior would be in violation of the new policy and the superior was enforcing the new guidelines on subordinates. *Id.* Upon that basis, the Army chose a rule that applies equally to all soldiers–regardless of rank, time in service, or the length of time the service member possessed the body art. *Id.*

nizations, (2) are indecent,[51] or (3) are unreasonably large or excessive in number.[52] The policy was expanding.

The message established that the mere visibility of a small inconspicuous tattoo was not prohibited per se.[53] Commanders must instead, establish two conditions for a tattoo violation to exist in a Class A uniform.[54] First, the tattoo must be visible.[55] Second, it must detract from a soldierly

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50. December 98 Administrative Guidance Message, *supra* note 48. In December 1998, the Army again published additional guidance on the new body art policy. This guidance gave more breadth to the policy. The guidance stated that the tattoo policy did not contain a "grandfather clause" that would allow exceptions for those members who obtained tattoos before the policy was promulgated. The December 1998 guidance provided criteria for commanders to determine prohibited tattoos and what to do in response to a violation. The message stated that examples of violations may include tattoos that: (1) show an alliance with extremist organizations, (2) are indecent, or (3) are unreasonably large or excessive in number. The policy was expanding..

51. *Id.* The December guidance provides as examples of indecent tattoos, which are grossly offensive to modesty, decency, or propriety; shock the moral sense because of their filthy, or disgusting nature; tend to incite lustful thought; or tend reasonably to corrupt morals or incite libidinous thoughts. *Id.*

52. The December guidance provides that an example of "excessive" tattoos would be "a series of tattoos that covers one limb." *Id.* In a recent Army newsletter, the Director of the Army's Human Resources Directorate, Office of the Deputy Chief of Staff for Personnel provided additional guidance on the Army's new body art policy. *See* Office of the Chief of the Public Affairs, *Hot Topics–Current Issues for Army Leaders*, Spring 1999 [hereinafter Hot Topics]. He stated that "if a soldier has a vine or snake tattoo going all the way from the ankle up the leg, the tattoo would detract from a soldierly appearance." *Id.* at 5-6.

53. December 98 Administrative Guidance Message, *supra* note 48. In December 1998, the Army again published additional guidance on the new body art policy. This guidance gave more breadth to the policy. The guidance stated that the tattoo policy did not contain a "grandfather clause" that would allow exceptions for those members who obtained tattoos before the policy was promulgated. The December 1998 guidance provided criteria for commanders to determine prohibited tattoos and what to do in response to a violation. The message stated that examples of violations may include tattoos that: (1) show an alliance with extremist organizations, (2) are indecent, or (3) are unreasonably large or excessive in number. The policy was expanding. The December administrative guidance states that "[u]nder most circumstances, inconspicuous, or inoffensive tattoos or brands on areas of the body other that the neck, face or head (i.e. ankle or hand) are not prohibited." *Id.*

54. *Id.* It is unclear from the guidance why the drafters of the guidance chose the Class A uniform as the measuring stick for "visible" uniform violations. The wording of the guidance suggests that tattoo violations may occur in other uniforms, but the drafters only provided guidance for Class A uniform.

55. *Id.*

appearance.[56] Discretion was left to commanders to decide whether a tattoo detracted from a soldierly appearance.[57]

The Army's current policy on body art is embodied in the June 1998 change to uniform regulation and the two subsequent ODCSPER messages.[58] There is currently no Department of Defense guidance in the area of body art. A comparison of the Army's body art policy with the other services' policies highlights the Army's shortcomings.

2. Marine Corps Policy-First to Strike

The Marine Corps was the first service to implement body art restrictions. In 1996, the Marine Corps promulgated changes to its uniform regulation, forbidding Marines to possess any body piercings, while on or off duty, except earrings for women.[59]

The Marine policy also prohibited tattoos or brands on the neck and head.[60] Other tattoos or brands anywhere else on the body are forbidden if the tattoo is prejudicial to good order, discipline, and morale or is of a nature to bring discredit upon the Marine Corps.[61] The Marine Corps does not further define the parameters of the policy.

3. Air Force Policy–A More Balanced Approach?

In June 1998, during the same month that the Army released its new body art policy, the Air Force released its new body art guidelines.[62] The Air Force created the policy in the wake of requests from commanders

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56. *Id.*

57. *See* Hot Topics, *supra* note 52, at 6. In response to the question, "who determines which tattoos are inappropriate or offensive," the Director of the Army Human Resources Directorate provided:

> Commanders make the decisions based upon the policy. All leaders should be involved in the process. Leaders observe soldiers in the work place and off duty. Also, soldiers should report information to their leaders upon identification or observation of soldiers with questionable tattoos. Leaders and commanders will review and observe the questionable tattoos and then counsel the soldiers regarding inappropriate tattoos.

Id. at 4.

58. *See supra* notes 40, 45, and 48.

wanting guidance to deal with the growing trend towards service members obtaining body art.[63]

The new Air Force policy is similar to the Army's policy, except that the Air Force grants more exceptions to the rules prohibiting the wear of body art. Air Force members may wear unexposed[64] body piercings when wearing a military uniform, performing official duty in civilian attire, or wearing civilian attire on the installation.[65] The Air Force's guidance also

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59. ALMAR Message 194/96, 160900Z, U.S. Marine Corps, MCBL 1020.34, subject: Uniform Regulations Pertaining to Tattoos, Body Piercing and Branding (16 May 1996). Subparagraph 2 states:

> [M]arines are associated and identified with the Marine Corps in and out of uniform, and when on or off duty. Therefore, when civilian clothing is worn, Marines will ensure that their dress and personal appearance are conservative and commensurate with the high standards traditionally associated with the Marine Corps. No *eccentricities* of dress will be permitted (emphasis added). Marines are prohibited from: (1) Wearing earrings (applicable to male Marines) and, (2) attaching, affixing, or displaying objects, articles, jewelry or ornamentation to or through their skin. Female Marines, however, may wear earrings consistent [with] paragraph 3009.

Id. The message added the following new paragraph to the Marines uniform regulation cited above: "[t]attoos or brands on the neck and head are prohibited. In other areas of the body, tattoos or brands that are prejudicial to good order and discipline and morale or are of a nature to bring discredit upon the Marine Corps are also prohibited." *Id.*

60. *Id.*

61. *Id.*

62. U.S. DEP'T OF AIR FORCE, AIR FORCE INSTR. 36-2903, DRESS AND APPEARANCE OF AIR FORCE PERSONNEL (IC 98-1, 8 June 1998) [hereinafter AIR FORCE DRESS CHANGE].

63. *See Questions and Answers Concerning Body Art*, AIR FORCE NEWS, June 18, 1998. *See also* M.J. Ainsley, *Tattoos and Piercings? Not in the Air Force* (visited Feb. 5, 1999) <www.wral-tv.com/news/wral/1998/0706-tattoos-and-piercings/> (indicating that many Air Force personnel voiced their distaste for what they believed to be additional unnecessary restrictions).

64. AIR FORCE DRESS CHANGE, *supra* note 62. In June 1998, during the same month that the Army released its new body art policy, the Air Force released its new body art guidelines. The Air Force created the policy in the wake of requests from commanders wanting guidance to deal with the growing trend towards service members obtaining body art. Air Force members are "prohibited from attaching, affixing, or displaying objects, articles, jewelry or ornamentation through the ear, nose, tongue, or other exposed body part (which includes visible through the clothing)." *Id.* By implication, the Air Force allows unexposed piercings.

provides that if the piercing impacts a service member's duty performance, it too may be prohibited.[66]

For tattoos, the Air Force carved out two prohibited categories: "unauthorized" and "inappropriate." "Unauthorized" tattoos are defined as those that are obscene; advocate sexual, racial, ethnic or religious discrimination; are prejudicial to good order and discipline; or bring discredit upon the Air Force.[67] "Inappropriate" tattoos are defined as those that are above the collarbone and visible when wearing an open-collar uniform and those exceeding one-fourth of the exposed body while in uniform.[68]

The Air Force policy requires its members to remove unauthorized tattoos at the service member's expense.[69] In certain circumstances, however, Air Force personnel may either cover inappropriate tattoos with the uniform or have them removed at Air Force expense.[70]

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65. *Id.* As additional exceptions to the Air Force the guidance provides:

> Females in uniform, or in civilian clothes while on duty, may wear one pair of small, spherical conservative diamond, gold, white pearl, silver pierced or clip earring per earlobe: the earring in each earlobe must match and the earrings must fit tightly without extending below the earlobe. In civilian clothes, off duty but on a military installation, females may wear conservative earrings within sensible limits.

Id.

66. The guidance also allows for stricter rules, if commanders articulate some other rational basis for additional restrictions. *Id.* For example, this would be the case "in those locations where Air Force-wide standards may not be adequate because of cultural sensibilities or mission requirements." *Id.* Another example would be "in a foreign country where tattoos/brands or body ornaments are objectionable to host country citizens or at installations when members are undergoing basic military training, a commander may impose more restrictive rules for military members, even off-duty and off the installation." *Id.* The Air Force states that "factors to consider when making this determination include (but are not limited to): impairing the safe and effective operation of weapons, military equipment or machinery; posing a health or safety hazard to the wearer or others; interfering with the proper wear of special or protective clothing or equipment." *Id.*

67. *Id.*

68. *Id.*

69. The Air Force policy states that covering an unauthorized tattoo is not an option. *Id.*

4. Navy Policy–Minimalist

The Navy has not regulated extensively in the area of body art. In July 1998, the Navy promulgated its body piercing policy prohibiting Navy members from wearing body piercings while in uniform or while on base.[71] The Navy policy allowed for off-duty, off-base wear of body piercings as long as the member was "not participating in organized military recreational activities."[72]

The Navy's tattoo policy is the least restrictive of the services.[73] The Navy policy provides that tattoos depicting controlled substances or advocating drug abuse are prohibited at all times on any military installation or under any circumstances that are likely to discredit the Navy.[74] The Navy's uniform policy is silent on racial or other types of offensive tattoos.[75] The Navy has no immediate plans to change its uniform regulation regarding body art.[76]

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70. AIR FORCE DRESS CHANGE, *supra* note 62. In June 1998, during the same month that the Army released its new body art policy, the Air Force released its new body art guidelines. The Air Force created the policy in the wake of requests from commanders wanting guidance to deal with the growing trend towards service members obtaining body art. The Air Force guidance states that the Air Force will not pay for removal of tattoos obtained after the effective date of the new body art policy. The Air Force policy also allows commanders to seek Air Force medical support for voluntary removal. *See Robins Air Force Base*, AIR FORCE NEWS (visited Oct. 30, 1998) <www.robins.af.mil/orgs/abw/support/mss/ news/afnews/tattoos.htm>. The Air Force provides two facilities that can remove tattoos: Wilford Hall in San Antonio, Texas, and Travis Air Force Base, California. According to this Internet site, both facilities were receiving a large amount of inquiries concerning body art removal. The method used to remove tattoos at both facilities was the scraping method as opposed to the laser removal method. *See infra* note 225 (describing the methods of tattoo removal). Both facilities, however, were expecting to receive the laser machinery in the near future.

71. U.S. DEP'T OF NAVY, UNIFORM REG., ch. 7, art. 7101.5 (5 Jan. 1999) [hereinafter NAVY UNIFORM REG.]. This guidance states that "[n]o articles, other than earrings for women, shall be attached to or through the ear, nose, or any other body part." *Id.*

72. *Id.* The Navy policy states that "body piercing is not authorized in civilian attire when in a duty status or while in/aboard any ship, craft, aircraft, or any military vehicle or within any base or place under military jurisdiction, or while participating in any organized military recreational activities." The Navy policy also allows commanders to impose stricter prohibitions on body piercings in foreign countries, when it is appropriate. *Id.*

73. NAVY UNIFORM REG., *supra* note 71, ch. 7, art. 7101.3.

74. *Id.*

III. Analysis of the Army's New "Body Art" Policy

The following analysis explores how the Army's body art policy squares with the First Amendment. In doing so, this article seeks to identify the military interest that is at risk when military members possess various forms of body art. The military interest at risk is then weighed against the personal intrusion on soldiers' First Amendment rights by prohibiting and regulating of body art. Next, this article examines whether the Army's body art policy, as currently written, could lead to constitutional overbreadth or vagueness concerns.

There continues to be confusion in the Army about the new body art policy.[77] Because of the policy's ambiguities, commanders are in a quandary about making the initial determination that a given tattoo constitutes a violation. Adding to the problem, the guidance is also unclear as to what to do once the commander determines that a soldier is in violation of the body art policy. The issues that arise are countless. For example, how does each commander's discretion play into applying the policy? What constitutes "indecent " under the Army's guidance? In a joint-service environment, which service policy should trump? Practically speaking, does it

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75. Memorandum, Navy Uniform Matters Office, subject: Navy Uniform Information Newsgram (1 May 1998). Although not contained in the Navy's uniform regulation, the Bureau of Naval Personnel Uniform Matter Officer issued a memorandum containing some informal guidance to the Chief Petty Officers' Community. The memorandum stated that a tattoo above the neckline creates a "permanently unprofessional appearance" that could lead to "substandard performance marks in "military bearing" to a point below the level of recommended for advancement or retention." *Id.* The memorandum also stated that military personnel with unprofessional tattoos on the legs, ankles, or arms can be directed by their commanding officer to permanently wear long sleeve shirts and slacks for women. *Id.* The guidance also provided that "[t]attoos that depict drug use, racism, or affiliation with groups, which discredit the Navy, should be processed for a 'best interests of the service' discharge." *Id.*

76. Telephone Interview with Boatswain's Mate, Master Chief (BMCM) (Surface Warfare) Cruse, Assistant Head for Navy Uniform Matters, Bureau of the Naval Personnel (Feb. 23, 1999). The Navy has no need to expand its current uniform policy to include any other specific body art because nothing has occurred to indicate that the Navy's policy should be changed. *Id.* Sailors may wear body piercings, to include earrings off base, off duty. The Bureau of Naval Personnel has not been notified of any problems with the current policy and the Navy has no current plans to change their uniform regulation regarding body art. *Id.*

77. *Cf.* D.E. Wylie, *Uniform Corner, Frequently Asked Questions* (visited Mar. 20, 1999) <http://www.odcsper.army.mil/dape/hr/hr_pr/uniform_corner.asp>. The Army's Office of the Deputy Chief of Staff for Personnel has established a website on the Internet to field questions concerning the uniform policy, to include the body art policy.

make sense that the services' policies differ? Should we inspect soldiers' bodies periodically to ensure compliance? Are the policies applied even-handedly across the board–male and female, officers and enlisted, and to all races? Can a soldier be separated solely for having a tattoo that is forbidden by the new policy? Given the policy's subjectivity and ambiguities, the answer to these questions depends on the interpretation of commanders and judge advocates in the field. The varying interpretations of the policy could lead to arbitrary and capricious policy application.

Besides the practical issues raised by the policy, there are also some concerns about the policy's legality. The Army's body art policy raises free speech, overbreadth and vagueness, as well as potential enforcement issues. Therein lies the legal and practical obstacles to overcome.

Through its new policy, the Army has indicated that it will tolerate some forms of body art while not tolerating other forms. The Army's policy is related to norms–both societal and military. In this context, there exists a "spectrum" of various forms of body art ranging from traditionally acceptable to traditionally unacceptable. Where the body art falls on the spectrum, depends, in part, on how radical or unusual the body art is. Each person's tolerance or taste for body art is different.

In the military context, the clearly "unacceptable" end of the body art spectrum includes such body art as extremist or gang-related tattoos, tattoos on the face or neck, facial piercings, or facial brands. The middle of the spectrum contains body art that falls into a grayer area. This gray area includes body art such as large tattooed areas of the body that are not seen in uniform,[78] "indecent" or unprofessional tattoos that are not visible in uniform, ornate tattoos that are visible in uniform,[79] or perhaps visible tattoos that are simply very large and that detract from a soldierly appearance.

The Army's policy regarding body art in this "grayer" area presents unique challenges for commanders. The more acceptable end of the spectrum includes such body art as small tattoos that do not detract from a soldierly appearance or send an inappropriate message, small brands, or earrings on women in dress uniforms.

The following analysis provides a framework to assist in examining the free speech legal issues raised by the Army's new policy. The spectrum

78. For example, large tattoos that cover the entire back.

79. For example, decorative tattoo tribal bands worn around the ankle or arm.

is analyzed below in three categories: (1) extremist or gang-related body art, (2) offensive body art, and (3) non-offensive body art. On-duty and off-duty wear of body art is also examined as a sub-category, as is visible verses covered body art. By evaluating the body art in each of these categories, it is easier to see the regulatory line blur.

A. Does the Army's Body Art Policy Impinge on Free Speech?

Many soldiers may instinctively believe that the new body art policy is unconstitutional and improperly limits soldiers' right to free speech.[80] There is a strong argument, however, that the Supreme Court would uphold the policy's validity on First Amendment grounds.[81] Given the Court's history in the area of examining First Amendment challenges in the military, one might presume the Army's victory in such a battle was a foregone conclusion.[82] This article takes issue with that presumption.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[83] In the civilian context, the government may enforce reasonable time, place, and manner restrictions that are content neutral, narrowly tailored to serve a significant government inter-

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80. *See* Woolverton, *supra* note 31. The 82d Airborne Division Commanding General at Fort Bragg directed that all commanders conduct physical inspections of their soldiers as part of their routine health and welfare program. The command designed the policy to identify tattoos, body markings, or other symbols representing racist beliefs, extremist organizations, or gang affiliation on the soldier's body not covered by the physical training uniform. If a commander found a potentially extremist-type tattoo, the commander was directed to interview the soldier and inquire into the meaning of the symbol and take appropriate action to address the situation. Some soldiers met the new inspection system with disapproval.

81. Parker v. Levy, 417 U.S. 733 (1974) (providing the guiding principle for First Amendment analysis in the military).

> While members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for the imposition of discipline, may render permissible within the military context that which would be constitutionally impermissible outside of it.

Id. at 758. *See generally* Captain John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 303 A.F. L. Rev. 33 (1998) (exploring free speech issues in the military).

est, and leave open ample alternative channels of communication.[84] Except for speech that is unprotected by the First Amendment,[85] the Supreme Court has held content-based regulations presumptively invalid.[86] Generally, this presumption is true unless the government has a

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82. *See* C. Thomas Dienes, *When the First Amendment is Not Preferred–The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779, 813 (1987). Dienes notes:

> [I]n reading the cases involving first amendment speech by military personnel, one is struck by their marked resemblance. They all reject the first amendment claim; none of them even discusses the importance of the claims being made. Almost all begin with an intensive rendition of statements from precedent on the special characteristics of the separate military society. Seldom does the Court particularize the government's interests as they are actually reflected in the regulation being challenged. Instead, there are generalized references to the need for military preparedness and the importance of duty and discipline in the military context.

Id. See also James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177 (1984) (reviewing the military's role in explaining the reasoning that courts have accepted to support military restrictions of service members constitutional rights); Kelly E. Henriksen, Note, *Gays, Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection as Their Area of Expertise*, 9 ADMIN. L. J. AM. U. 1273 (1996) (exploring the notion that courts give little more than cursory review to cases in which military deference is critical to the outcome); Karen A. Ruzic, Note, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHI.-KENT. L. REV. 265 (1994) (presenting the position that the Supreme Court's notion of judicial deference has not kept up with modern times).

83. U.S. CONST. amend I.

84. United States v. Grace, 461 U.S. 171, 177 (1983). The Supreme Court in *Grace* invalidated a federal statute banning expressive picketing and leafletting on public sidewalks outside the Supreme Court when a clear line could be drawn between sidewalks and other grounds that comported with congressional purpose of protecting the building, grounds, and people therein.

85. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (stating the right of free speech is not absolute at all times and does not include the use of lewd and obscene, profane, libelous and other words which by their very utterance inflict injury or tend to incite an immediate breach of the peace); New York v. Ferber, 458 U.S. 747 (1982) (holding that obscene speech is unprotected); Miller v. California, 413 U.S. 15 (1973) (obscene speech held constitutionally unprotected).

86. *See* R.A.V. v. City of St. Paul, 505 U.S. 383 (1992) (holding a "hate speech" statute facially invalid under First Amendment and holding that "content-based regulations" are presumptively invalid) (citing Simon & Schuster, Inc v. Members of N.Y. State Crime Victims Bd., 122 S. Ct. 501, 508 (1992)). *See also* Texas v. Johnson, 491 U.S. 397, 406 (1989) (holding that the First Amendment prevents the government from proscribing speech or expressive conduct because of the disapproval of the ideas expressed).

compelling interest in restricting speech and the regulation is narrowly tailored to meet that interest.[87]

The freedom of speech concept in a military context, however, has much greater limitations.[88] Although scholars have debated the issue at length, most agree that the First Amendment applies to soldiers.[89] In military cases, the Supreme Court has said that a "military regulation may restrict speech no more than is reasonably necessary to protect a substantial government interest."[90] The Supreme Court will consider military

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87. *R.A.V.*, 505 U.S. at 385. In other cases, the Supreme Court has used the words "important or substantial." *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).

88. *See* Parker v. Levy, 417 U.S. 733 (1974) (sustaining the court-martial conviction of an Army officer who had counseled enlisted soldiers to refuse to obey orders sending them to Vietnam even though similar speech by civilians would have been protected). *See also* Brown v. Glines, 444 U.S. 348 (1980) (upholding a regulation requiring Air Force members to obtain command approval before circulating petitions on base); Ethredge v. Hail, 56 F.3d 1324 (11th Cir. 1995) (holding that military officials may impose regulations on speech as long as the regulations are reasonable, not an effort to suppress expression merely because public officials oppose the speaker's view, and aimed at ensuring military effectiveness); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (the "don't ask, don't tell" statute does not target speech declaring homosexuality; but rather, targets homosexual acts and the propensity to engage in homosexual acts, and thus permissibly uses the speech as evidence).

The Supreme Court in *Brown* said that "a military regulation may restrict no more speech than is necessary to protect a substantial government interest." *Brown*, 444 U.S. at 355. A military commander's authority to bar persons or speech from a base even extends to civilians. *See, e.g.*, Cafeteria & Restaurant Worker's Union v. McElroy, 367 U.S. 886, 892-94 (1961).

89. Chappell v. Wallace, 462 U.S. 296, 304 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962)) ("Citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."). *See* Greer v. Spock, 424 U.S. 828 (1976) (upholding an Army regulation that prohibited political speeches and demonstrations on base). In *Greer*, Justice Brennan provided the following guidance:

> [T]he First Amendment does not evaporate with mere intonation of interests such as national defense, military necessity, or domestic security. . . . [i]n all cases where such interests have been advanced, the inquiry has been whether the exercise of First Amendment rights necessarily must be circumscribed in order to secure those interests. (Brennan, J., dissenting).

Id. See also General Media Communications v. Perry, 952 F. Supp. 1072, 1081 (S.D.N.Y. 1997) ("Citizens do not jettison there constitutional rights simply by enlisting in the armed forces . . . .").

90. *Brown*, 444 U.S. at 355.

member's speech constitutionally unprotected if the speech somehow undermines the effectiveness of the command.[91] In making that determination, courts grant "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[92] The Supreme Court has emphasized that the military is a "specialized society" and the rules are applied differently to them as compared to the rest of society.[93] In fact, the Supreme Court allows prohibitions on speech in the military context that would be unconstitutional in a civilian setting.[94]

The Supreme Court has provided a somewhat nebulous First Amendment standard of review in military settings coupled with great deference towards military judgment. Applying this review standard in the area of body art raises several concerns addressed herein.

1. Extremist or Gang-Related Body Art

It is easier at the far end of the body art spectrum to articulate not merely rational reasons but perhaps compelling reasons why extremist, racist, and gang-related body art should be prohibited, whether covered by the uniform or not.[95] Extremism, racism, and gang-affiliation are divisive to a military fighting force and contrary to the idea of teamwork fostered within the military environment.[96] In striking the proper balance between legitimate military needs and individual liberties, the Army has an interest in removing from its ranks soldiers with gang affiliations or extremist

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91. *Parker*, 417 U.S. at 743.

92. *See* Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986). The Supreme Court upheld an Air Force regulation prohibiting an Orthodox Jew who was a commissioned officer in the Air Force from wearing a yarmulke, indoors while on duty in uniform. The Court held that the rabbi's First Amendment rights were not violated against a First Amendment challenge. The Supreme Court deferred to the professional judgment of the military authorities that uniform appearance standards are necessary to maintain unity and discipline. *But see* 10 U.S.C.A. § 774 (West 1998) (legislatively overruling *Goldman*). This statute provides for neat and conservative wear of religious apparel while wearing the military uniform unless duty performance were impacted.

93. *Parker*, 417 U.S. at 743. *See* Burns v. Wilson, 346 U.S. 137 (1953) (endorsing the military as a separate society and balancing the military's need to safeguard discipline and morale against free speech).

94. *See* Ross G. Shank, *Speech, Service, and Sex: The Limits of First Amendment Protection of Sexual Expression in the Military*, 51 VAND. L. REV. 1093 (1998) (discussing the limits on sexual expression in the military context when that same speech is unreachable in the civilian context). *See generally Parker*, 417 U.S. 733.

political or social views.[97] This is necessary to sustain the loyalty, morale, and discipline of the fighting force.[98]

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95. The Army's new body art policy does not attempt to define "extremist" as it relates to extremist body art. *See* December 98 Administrative Guidance, *supra* note 48. This article does not attempt to define what the Army means by "extremist" organizations, although the problems associated with "what" extremist body art may include is more closely analyzed in the vagueness/overbreadth section of this article. Note, however, that the Army has published guidance relating to the extremist activities of Army members. This is a logical place to look for guidance concerning extremist body art. The Army's guidance on extremist organizations is currently in message format as a change to *AR 600-20*. *See* Message, 201604Z Dec 96, Headquarters, Department of Army, DAPE-ZE, subject: Revised Army Policy on Participation in Extremist Organizations or Activities, para. 4-12C.2.A (20 Dec. 1996); U.S. DEP'T OF ARMY, REG. 600-20, COMMAND POLICY, para. 4-12 (20 Dec. 1996) [hereinafter AR 600-20 (new policy)]. The message states that extremist organizations and activities include:

> [O]nes that advocate racial, gender, or ethnic hatred or intolerance; advocate, create, or engage in illegal discrimination based on race, color, sex, religion, or national origin; advocate the use of force or violence or unlawful means to deprive individuals of their rights under the United States Constitution or the laws of the United States, or any state, by unlawful means.

Id. The definition of "extremism" may vary greatly depending on one's interpretation. One scholar has explored the legal implications of the notion of varied definitions in great depth. *See* Hudson, *supra* note 11. Major Hudson states that several categories of extremism–"from left to right"–exist and are not covered by the Army's definition. *Id.* at 9. Major Hudson submits that this may be a deliberate attempt by the Army to "narrow the focus on particular types of extremism." *Id.* Major Hudson notes that the Army's definition of extremist organizations does not include many organizations such as: "communist, socialist, environmentalist, homosexual, libertarian, anti-communist, anti-tax, anti-gun control, and so called "patriot" or anti-government (usually associated with far right and militias) extremists." *Id.*

96. EXTREMIST TASK FORCE REPORT, *supra* note 38. The Secretary of the Army Task Force concluded that "leaders recognize that even a few extremists can have a pronounced dysfunctional impact on the Army's bond with the American people, institutional values, and unit cohesion. AR 600-20, *supra* note 30, ch. 4.1, states:

> [M]ilitary discipline is founded upon self-discipline, respect for properly constituted authority, and the embracing of the professional Army ethic with its supporting individual values. Military discipline will be developed by individual and group training to create a mental attitude resulting in proper conduct and prompt obedience to lawful military authority.

Id.

97. *See* Hudson, *supra* note 11. Note, however, it is important for the Army's policy to take notice of the fact that having a particular type of tattoo does not always equate to the soldier having racist or gang-related affiliations.

The Supreme Court has held that a sufficiently important governmental interest can justify limitations on First Amendment freedoms when speech and non-speech elements are combined in the same course of conduct–such as in the case of a soldier declaring his homosexuality.[99] The Army's body art policy, as it applies to extremist or gang-related body art, can be compared in some ways to the Army's homosexual exclusion policy.[100] The homosexual policy provides that if a service member states that he is homosexual, the statement alone creates a rebuttable presumption that he will engage in activity that is prohibited by regulation.[101] The military has put forward that it is the homosexual activity that becomes the

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98. *Id.*

99. Able v. United States, 847 F. Supp. 1038 (1994) (citing United States v. O'Brien, 391 U.S. 367, 376 (1968) (setting forth the criteria for determining whether a limitation of free speech is necessary). The court in *Able* examined the proposition that the "don't ask, don't tell" homosexual exclusion policy contained both "speech" and "non-speech" elements, in that the statement declaring one's homosexuality is more than just speech because it is also evidence of one's proclivities and potential conduct. *See O'Brien*, 391 U.S. at 377. The Supreme Court noted:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the [g]overnment; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

100. This idea flowed from a conversation the author had with Major Mike Smidt, Professor, U.S. Army Judge Advocate General's School in December 1998.

101. 10 U.S.C.A. § 654(b)(2) (West 1998). *See also* DEPARTMENT OF DEFENSE DIRECTIVE 1332.14 (Dec 1993). The DOD directive provides in part, that a service member may be separated from the armed services if he has "engaged in, attempted to engage in, or solicited another or engaged in a homosexual act"; or has "stated that he or she is a homosexual or bisexual . . . unless . . . the member has demonstrated that he or she is not a person who engages in or attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." *Id. See also* Able v. United States, 155 F.3d 628 (1998) (holding that a member's First Amendment right to free speech was not violated by the "don't ask, don't tell" homosexual exclusion policy).

legal basis for the separation–not the mere statement that the person is a homosexual.[102]

Similarly, wearing extremist or gang-related body art may create a presumption that the service member holds beliefs that are contrary to good order and discipline and that he will act or has acted, on those beliefs.[103] If the soldier rebuts the presumption, the Army may allow him to remain in the service.[104] If the soldier does not rebut the presumption, he may be discharged for his affiliations and actions associated with those affiliations rather than his speech (the tattoo).[105] Hence, the Army could argue that it is legitimately advancing its objective to sustain loyalty, morale, and discipline rather than improperly suppressing speech.

The resolution of this issue becomes more troublesome, however, when a service member denies holding extremist-type beliefs, but possesses what appears to be "extremist" body art.[106] If the soldier has rebutted the presumption outlined above, the Army policy still prohibits the speech by either directing the soldier to remove the body art or to face adverse action.[107] The Army takes the position that an interest in suppressing or regulating such speech still exists.[108] The Army could argue that mere presence of extremist body art would tend to disrupt morale, incite violence, or create discord among the troops.[109] In this sense, the Army's

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102. *See* Steffan v. Perry, 309 U.S. D.C. 281 (D.C. Cir. 1994) ("The military may reasonably assume that when a member states that he is a homosexual, that means that he either engages or is likely to engage in homosexual conduct."). *See also* Pruitt v. Cheney, 963 F.2d 1160, 1163 (9th Cir. 1991) (holding that a declaration of homosexuality can be admitted as evidence of facts admitted).

103. This is a theoretical proposition posited by the author and is not the Army's announced policy.

104. The Army body art policy as written is actually not clear on this point. It is unclear whether a soldier with body art that violates the letter of the current policy must choose to remove the symbol from his body or automatically face adverse administrative action to include separation from the Army. The language of the administrative guidance suggests that this is the case. *See* December 98 Administrative Guidance, *supra* note 48.

105. This is a somewhat disturbing proposition given the arguments the Army could possibly make along these lines (for example, a situation in which a soldier has on his body a tattoo of a rainbow). The gay culture has adopted the rainbow as a symbol of the solidarity amongst homosexuals. *See Rainbow World* (visited June 2, 1999) <http://www.rainbow-world.com>. Given the Army's policy of excluding homosexuals from the service, the Army could assert that such a tattoo alone would constitute a statement of homosexuality and the basis for adverse action or an investigation.

regulation of inflammatory tattoos is necessary to unit cohesion and to the military mission.[110]

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106. *See* discussion *supra* note 95 (discussing what may constitute "extremist" following the Army extremist policy). *See also* Keith Aoki, *How "The World Dreams Itself American"–Reflections on the Relationship Between the Expanding Scope of Trademark Protection and Free Speech Norms* (visited June 1, 1999) <http://www.law.uoregon.edu/~kaoki/LOYOLA.html>.

> The swastika serves to illustrate both the point that the visual messages sent by symbols are multiple and that the embodied meanings change as a result of time and human interaction. The swastika is the world's oldest known, and most widely dispersed symbol, the swastika spans the history of human existence, originating with prehistoric man and existing in postmodernity. It spans the globe, existing simultaneously in the Americas, Europe and the Orient. Until the present time, and in all places, the swastika was an amulet or charm, a sign of benediction, the visual embodiment of a blessing for long life, good fortune and good luck. This use of the swastika as an amulet represents the universal texts embodied by the swastika; the first rank in the hierarchy of meaning. Additional levels of meaning are also embodied by the swastika in its various forms. As the swastika was adopted by different cultures, it took on multiple texts, and different visual forms of the swastika came to act not only as symbols of good luck, but as symbols of religious, or cultural affiliation. The benign texts embodied by the swastika survived well into the twentieth century where it suddenly became the most vilified symbol of human history. The swastika no longer embodies benign texts, but has come to be recognized as the embodiment of the Nazi party, and later as the embodiment of all the horror of Nazi Germany.

Id.

107. *See* December 98 Administrative Guidance, *supra* note 48. This would be the case in several scenarios. Take for example, a case in which a soldier once held extremist-type beliefs but no longer does. The Army policy states that a soldier could potentially face adverse administrative action if he chose not to remove the tattoo. Another fact scenario might be a soldier who has a tattoo that does not represent to him what the Army would believe the tattoo/brand represents. Again, based on the Army's interpretation, it seems the soldier could be forced to either remove the tattoo/brand or face adverse action, to include possible discharge from the Army. *Id.*

108. *Id.*

109. *See* AR 600-20, *supra* note 30. The 82d Airborne Division Commanding General at Fort Bragg directed that all commanders conduct physical inspections of their soldiers as part of their routine health and welfare program. The command designed the policy to identify tattoos, body markings, or other symbols representing racist beliefs, extremist organizations, or gang affiliation on the soldier's body not covered by the physical training uniform. It a commander found a potentially extremist-type tattoo, the commander was directed to interview the soldier and inquire into the meaning of the symbol and take appropriate action to address the situation. Some soldiers met the new inspection system with disapproval.

The Army policy also censors extremist-type body art that is covered by clothing and not readily visible in uniform.[111] The Army's interest in maintaining unit cohesion, even if extremist-type body art is covered, remains constant. The assertion that others cannot see certain body art because of its location on the body, is somewhat of a fallacy in a military environment. The nature of the Army is such that in close quarters or in a field environment such things as group showers and laundry points necessitate that soldiers disrobe in front of one another. During physical training, more of a soldier's body is visible to fellow soldiers than is normally the case when wearing the daily field or garrison uniform. Also, when receiving medical care, a soldier must frequently disrobe. The Army's interest in avoiding divisiveness among the troops is so great that it can constitutionally prohibit extremist body art, even if the body art is discreetly located and viewed only in rare or unusual circumstances.[112]

2. Indecent Body Art

The Army policy that prohibits "indecent" body art presents a more difficult constitutional problem.[113] Society determining that certain speech is offensive is not ordinarily a sufficient reason for suppressing that

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110. This is analogous to the Army's prohibition on displaying extremist paraphernalia in the barracks. Commanders have the authority to order soldiers to remove symbols, flags, posters, or other displays from barracks if the commander determines that such a display would affect good order and discipline. *See* AR 600-20 (new policy), *supra* note 95, para. 4-12C.2.C.

111. December 98 Administrative Guidance Message, *supra* note 48.

112. The counter-argument, however, is that the mere risk of others seeing the body art on those rare aforementioned occasions is not sufficient justification for a complete prohibition–particularly given that "extremism" is dependent on interpretation and not all categories of "extremism" are covered by the Army's extremist policy. *See, e.g.*, Hudson Interview, *supra* note 29.

113. The Army policy states that body art is indecent when it is grossly offensive to modesty, decency, or propriety; shocks the morale sense because of its filthy or disgusting nature; tends to incite lustful thought; or tends to corrupt the morals or incite libidinous thoughts. December 98 Administrative Guidance Message, *supra* note 48. In December 1998, the Army again published additional guidance on the new body art policy. This guidance gave more breadth to the policy. The guidance stated that the tattoo policy did not contain a "grandfather clause" that would allow exceptions for those members who obtained tattoos before the policy was promulgated. The December 1998 guidance provided criteria for commanders to determine prohibited tattoos and what to do in response to a violation. The message stated that examples of violations may include tattoos that: (1) show an alliance with extremist organizations, (2) are indecent, or (3) are unreasonably large or excessive in number. The policy was expanding.

speech.[114] The government may constitutionally restrict obscene speech and expressive conduct.[115] Obscenity, however, does not necessarily equal indecency.[116] Courts have held that the First Amendment may protect indecent material, even when obscene material is not protected.[117] There are two reasons why restrictions on "offensive" non-obscene speech violate the First Amendment. First, there is no constitutionally acceptable way to distinguish offensive from inoffensive speech.[118] Second, banning non-obscene offensive speech improperly restricts content-based expression protected by the First Amendment.[119]

One argument to support the prohibition may be that the military has an interest in facilitating the cohesion of military forces–providing a "non-

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114. *See* F.C.C. v. Pacifica Foundation, 438 U.S. 726, 745 (1978). The Court held that restrictions on "indecent speech broadcast over the airwaves violates the constitutional guarantee of free speech in that the requirements had obvious speech-restrictive effects for viewers and operators, and were not narrowly or reasonably tailored to meet the legitimate objective of protecting children from exposure to patently offensive materials." *Id.*

115. Miller v. California, 413 U.S. 15 (1973) (defining the test for obscenity). The majority opinion provided that obscene material is not protected by the First Amendment. The Court articulated the proper standard as to whether particular material was obscene: whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appealed to the prurient interest, whether the work depicted or described, in a patently offensive way, sexual conduct specifically defined by the applicable state law, as written or authoritatively construed, and whether the work, taken as a whole, lacked serious literary, artistic, political, or scientific value. Obscenity was to be determined by applying "contemporary community standards." *Id.*

116. *See* Reno v. American Civil Liberties Union, 521 U.S. 844 (1997). The Court held, in part, that the Communications Decency Act of 1996 provisions that prohibited knowing transmission to minors of "indecent" or certain "patently offensive" communications abridge the freedom of speech protected by the First Amendment. The Court imposed an "especially heavy burden on the [f]ederal [g]overnment to explain why a less restrictive provision would not be as effective," and why the provisions were not narrowly tailored to the goal of protecting minors from potentially harmful materials. *Id.*

117. *Id.* (holding the Communications Decency Act of 1996 (47 U.S.C. §§ 223(a), and 223(d)) provisions, which prohibit knowing transmission to minors of "indecent" or certain "patently offensive" communications, to abridge free speech protected by First Amendment). *See* General Media Communications v. Perry, 952 F. Supp. 1072 (1997) (citing Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, (1989) (holding that a ban on "dial-a-porn" messages is unconstitutional)). In *General Media Communications*, the United States Court of Appeals for the Second Circuit vacated and remanded the United States District Court for the Southern District of New York decision enjoining the enforcement of the Military Honor and Decency Act of 1996 (10 U.S.C. § 2489a) which barred the sale or rental of "sexually explicit material" by military personnel acting in an official capacity. The district court had granted a permanent injunction barring enforcement of the Act on grounds that it violated the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment.

hostile" work environment for all soldiers. Perhaps the sexual nature of the body art may offend women who make up a large part of the military. The Army may also submit that indecent body art may offend some male soldiers.[120] Hence, the potential breakdown of unit cohesion and the possible affect on the military mission may allow the Army to prohibit indecent speech.[121]

A stronger argument for prohibiting visible indecent tattoos is that the military has an interest in providing appearance standards for its soldiers. When balancing this interest and the soldier's free speech interest, the Army's interest may outweigh the soldier's rights.[122] In the case where an "indecent" tattoo is not visible in uniform, however, the rationale for upholding a military interest in appearance is weak.[123]

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118. *See Reno*, 521 U.S. at 844. The Supreme Court in that case indicated that "the many ambiguities concerning the scope of its coverage render it problematic for First Amendment purposes." The Court used as an example the undefined terms "indecent" and "patently offensive" as possibly provoking uncertainty among speakers about how the two standards relate to each other and just what they mean. *Id.* The Court found that the vagueness of such a content-based regulation, coupled with its increased deterrent effect as a criminal statute, raise special First Amendment concerns because of its obvious chilling effect on free speech. *Id. See also General Media Communications*, 952 F. Supp. at 1074, (interpreting Cohen v. California, 403 U.S. 15, 25, (1971) (offensive speech such as "fuck the draft" on the back of a civilian jacket is constitutionally protected by the First Amendment)).

119. *See General Media Communications*, 952 F. Supp. at 1082. Although *General Media Communications* was overturned, and the statute prohibiting the sale of pornography on Department of Defense controlled property was held to be constitutionally valid, the case was not overturned on First Amendment free speech grounds. The case was overturned on the basis that the military has the authority to legitimately dictate what can be sold at military exchanges. Soldiers can still purchase pornography off-post and read it on-post, therefore, the First Amendment rights were not infringed on in any meaningful way. In some cases, the Supreme Court has upheld statutes that appear to impinge on free speech when other than free speech is at issue. See, e.g., Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973). *The* governmental interest in prohibiting nude dancing is unrelated to the suppression of free expression, since public nudity is the evil the state seeks to prevent, whether or not it is combined with expressive activity.

120. The contention that unit morale will somehow break down because male soldiers may see other male soldiers' indecent tattoos is, however, a debatable issue.

121. The Army may also argue that "indecent" body art may be service discrediting based on the "general" article of the Uniform Code of Military Justice. *See* UCMJ art. 134 (West 1998) (prohibiting conduct which is disorderly or service discrediting).

122. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986).

3. Non-Offensive Body Art[124]

A great deal of body art can be viewed as non-offensive or content-neutral.[125] Many tattoos are nothing more than designs that appeal to the wearer from an aesthetic point of view. Many piercings are non-offensive and content-neutral in that they are simply decorative studs, precious stones, bars, or metal hoops.[126] Non-offensive decorative body art may still, nonetheless, constitute symbolic speech.[127]

To determine whether body art is constitutionally protected under a First Amendment analysis, one must first establish that the body art is a form of symbolic speech.[128] The Supreme Court has interpreted First Amendment protections to reach modes of symbolic speech such as wear-

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123. With regards to body art that is generally covered by the uniform, it is difficult to imagine a situation in which a male soldier would be offended by another male soldier's "indecent" body art in the same way that a soldier might be offended by racist, extremist, or gang-related body art. The military's interest in prohibiting indecent body art is not to avoid discord among the troops, for it is unlikely indecent body art would cause the same dissension among the troops that extremist-type body art might cause. The military's interest appears instead to be censorship of a distasteful message.

124. The term "non-offensive" body art in this article is used to describe body art that may simply be decorative and arguably content-neutral.

125. The term "non-offensive and/or content-neutral" is used in this context to apply to body art that could not be legitimately prohibited because of the inappropriate message it conveys. Rather, in some cases, the Army prohibits some body art simply because of its location on the body or the size of the body art.

126. *See* Passage Piercing, *supra* note 17.

127. *See* Olesen v. Board of Educ., 676 F. Supp. 820 (N.D. Ill. 1987) (holding that male students have an interest in wearing an earring to school). *See also Old Ritual-New Fad*, (visited Mar. 20, 1999) <http://www2.apsu.edu/www/capsule/tattoo96.htm> ("Tattoos and piercings seem to be used as a form of personal, artistic and symbolic expression.").

128. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968). In *O'Brien*, the Supreme Court laid out the four-part test for whether symbolic speech is entitled to First Amendment protection. The Court said that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. *Id.* The Supreme Court provided the following four-part test:

> A government regulation is sufficiently justified if: (1) it is within the constitutional power of the government, (2) it furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free expression, and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

ing black armbands to protest the Vietnam war[129] and defacing the American flag.[130] Similarly, body art may be interpreted as symbolic speech. Justifying regulations that affect such speech should be articulated in the same manner as other forms of speech.[131]

The Army could argue that body piercing "ornamentation" is not a form of pure speech, but rather an expression of fashion or individuality–and hence not constitutionally protected. Arguably, however, body art conveys some message or the Army would not seek to regulate it. The Army's concern with how the rest of society perceives the military, supports the proposition that body art is symbolic.[132]

History also supports the proposition that wearing various types of jewelry has traditionally been interpreted as symbolically expressing communication. For example, the wearing of a simple ring on the left hand, third finger sends the message that the ring wearer is married or engaged.[133] The wearing of a cross, Star of David, or other religious symbol on a necklace or as an earring may represent religious faith.[134] Even the wearing of simple decorative precious stones are sometimes said to send messages–such as the oft used phrase "diamonds are forever." Similarly, those who possess body piercings send symbolic messages.[135] The

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129. *Id.*

130. *See* Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990) (finding that flag burning was a symbolic speech).

131. Tinker v. Des Moines, 393 U.S. 503 (1969) (wearing a black armband to protest the Vietnam War is a symbolic speech). *The* majority held that the wearing of armbands entirely divorced from actually or potentially causing disruptive conduct by those participating in it, was closely akin to "pure speech" and is entitled to comprehensive protection under the First Amendment. *Id.* Thus, the school regulation prohibiting students from wearing the armbands violated the students' rights of free speech under the First Amendment. *Id.*

132. ARMY NEWS SERVICE, *Piercings Prohibited For Most Soldiers On Post*, Aug. 11, 1998. Sergeant Major Larry L. Strickland, senior enlisted noncommissioned officer, the Office of the Deputy Chief of Staff for Personnel, was interviewed about the development of the policy and attested that part of the reason for the policy is the following:

> [M]ilitary has an image to project to the public, an image can clash against pop culture embraced by young civilians. Inappropriate tattoos, pierced body parts, multi-hue-dyed or sculpted hair designs and other personal appearance fads are just as out of place in today's Army as "duck-tail" haircuts were verboten in the 50s and prophet-length hair during the 60s and 70s.

Id.

intended symbolic message sent is arguably personal and specific to the wearer. As symbolic speech, the military would need to articulate a reasonable basis for prohibiting and regulating body piercing.[136]

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133. *See Wedding Traditions* (visited June 2, 1999) <http://wedding.gogrrl.com/link/3_cultural.asp> (describing the tradition of the wedding ring).

> A bride's engagement ring and wedding ring are traditionally worn on the third finger of the left hand (the finger next to your little finger). Although there is no precise evidence to explain the origin of this tradition, there are two strongly held beliefs. The first, dating back to the 17th century, is that during a Christian wedding the priest arrived at the fourth finger (counting the thumb) after touching the three fingers on the left hand 'in the name of the Father, the Son and the Holy Ghost'. The second belief refers to an Egyptian belief that the ring finger follows the *vena amoris*, that is, the vein of love that runs directly to the heart.

Id. Consider in this context that wedding rings and engagement vary in shape, simplicity, decorativeness and design–yet each represents something personal to the wearer.

134. *See Biblical Concepts–Religious Symbols* (visited June 1, 1999) <http://www.biblicalheritage.com/religiou.htm>. The six-pointed star known in Hebrew as magen David, literally, "Shield of David"–the paramount symbol of Judaism–has been used explicitly for a few hundred years. The practice of placing the figure of Jesus on the cross began near the end of the sixth century. *Id.* In fact, throughout history, many symbols have been used as visible reminders of faith and personal spirituality when various religions were unable to profess their faith openly for fear of persecution. *See, e.g., Symbols* (visited June 1, 1999) <http://www.catacombe.roma.it/symb_gb.html>. The term "symbol" referred to a concrete sign or figure, which, according to the author's intention, recalls an idea or a spiritual reality. Such symbols of faith include, the Good Shepherd, the "Orante" (a praying figure with arms open symbolizing the soul living in peace), the monogram of Christ and the fish. *Id.*

135. *See, e.g.*, Melanie Munson, *Ancient Traditions Become Modern Trend* (visited June 1, 1999) <http://www.cusd.claremont.edu/www/clubs/wolfpacket/dec1896/feat1.html>. "[O]rnamental uses of body piercing have been used in a vast range of cultures, both ancient and contemporary. Often used for reasons of religious purposes, communication, and decoration, these processes have found their way to being trends from the past to the present." *Id.*

> [E]ar piercing, the trend that has existed longer in the twentieth century than that of any other body part, also has a history of origination. Egyptians first wore large gold hoops, which evolved into smaller earrings that supported pendants. In Babylonia and later in Assyria, earrings were worn by men to denote rank.

Id. "Naval piercing, the main form of body piercing amongst women, is believed to have originated in Egypt where this special privilege was reserved for members of the priesthood and the royal line." *Id.*

136. *See* Tinker, *supra* note 131.

In *Goldman v. Weinberger*, the Supreme Court balanced a service members' First Amendment rights against the military's uniform policy.[137] In *Goldman*, the weight of the balance fell on the side of the uniform policy.[138] Although *Goldman* concerned a free exercise of religion claim, the same arguments are analogous in a free speech claim.[139] The Supreme Court gave enormous discretion to the services to dictate what is necessary in a military context.[140] In the same vein, the military will be given great deference to make its own appearance regulations because of its status as a "specialized" and "separate society."[141] Applying these concepts in the area of body art, the Supreme Court would likely uphold the military's new body art prohibitions as constitutional.

Perhaps the most difficult area of prohibitions for the military to justify constitutionally is that of non-offensive, non-visible body art. If the body art cannot be seen and it does not affect duty performance, the Army's reach at regulating this type of body art as a form of speech is somewhat tenuous. Take for example, the case of body piercings. The Army's body art policy prohibits all piercings and many content-based tattoos–whether visible or not in uniform.[142] This aspect of the policy prohibits some forms of speech without the balance of a countervailing military interest weighing in favor of restriction of such protected symbolic speech. From a constitutional standpoint, the Army's policy prohibiting body art forms that are not visible in uniform and that do not interfere with duty performance is overly restrictive.[143] Without some other justifi-

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137. *See* Goldman v. Weinberger, 475 U.S. 503 (1986).

138. *Id.*

139. *Id.*

140. *Id.* at 540. In *Goldman*, the Supreme Court found that "[t]he peculiar nature of the Air Force's interest in uniformity" was enough a strong reason to allow for enormous discretion in crafting uniform regulations that may impact on other soldier rights–such as freedom of religion.

141. *Id.* at 507. The Supreme Court stated in *Goldman* that "[c]ourts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."

142. *See* June 98 Wear and Appearance Message, *supra* note 40.

143. This article does not fully examine the possible religious implications of the new body art policy. The new body art policy does, however, present problems in the religious category. Arguably, the prohibition on non-visible body piercings potentially conflicts with the Department of Defense position regarding religious accommodation. The current statutory policy allows for religious articles that are not visible in uniform. The Army's body art policy does not. *See* 10 U.S.C.A. § 774 (West 1998) (providing for neat conservative wear of religious apparel).

cation, the constitutional weight of the balance falls in favor of free speech in these cases.

B. Facial Validity of Regulations

The Army's body art policy raises substantial vagueness and overbreadth issues examined herein. This section examines the notion that the policy unfairly goes too far at restricting personal activity that may not affect Army interests. It also explores the difficulties that the Army body-art policy raises for both commanders and soldiers to know what forms of body art are proscribed. Finally, this section examines whether the Army policy fails to provide clear guidance to commanders regarding what is required once a solider has actually violated the policy.

1. Overbreadth

Military regulations are presumed inherently valid if the regulation has a valid military purpose.[144] The *Manual for Courts-Martial* provides:

> The [regulation] must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs.[145]

Based on the above guidance, a commander's regulatory authority is not unlimited.[146] If orders or directives are only tangentially furthering a military objective, are excessively broad in scope, are arbitrary and capricious, or are needlessly abridging a personal right, they are subject to close scrutiny and may be invalid and unenforceable.[147] Applying this standard

144. *See* United States v. Martin, 5 C.M.A. 674, 676 (1952); United States v. Dykes, 6 M.J. 744 (N.C.N.R. 1978).

145. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para 14-c (2)(a)(iii) (1998). *See generally* United States v. Green, 22 M.J. 711, 716 (A.C.M.R. 1986) *cited in* United States v. Womack, 27 M.J. 630, 633 (A.F.C.M.R. 1988), *aff'd*, 29 M.J. 88 (1989) (holding that a military policy that prohibited soldiers from having alcohol in their system or on their breath was unlawful).

146. *Green*, 22 M.J. at 715.

to the Army's body art policy shows that it cannot withstand a constitutional test.[148]

To analyze the body art policy applying the above-stated standard, each military purpose espoused to justify the policy is examined separately below.

a. Appearance

One obvious legitimate purpose of the body art policy may be to regulate the appearance of soldiers. Given the way the Army policy is currently drafted, however, overbreadth problems exist regarding appearance. First, the policy equally regulates both visible and covered body art.[149] Second, the policy applies to soldiers both on and off duty and on and off base.[150] A logical distinction may be made between these categories.

The courts have consistently held that the military may dictate, in many regards, the appearance of its members.[151] The deference given to the military in this area is enormous.[152] In some cases, courts have deter-

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147. *See* United States v. Padgett, 48 M.J. 273 (1998). *See also* United States v. Milldebrandt, 25 C.M.R. 139 (C.M.A. 1958) (holding that an order directing a service member to disclose personal financial transactions made during leave status was invalid given that it did not relate to military requirements); United States v. Nation, 26 C.M.R. 504 (C.M.A. 1958) (holding that a Navy regulation that required a six-month waiting period before applying to marry an alien was overbroad, unreasonable, and unenforceable). *Womack*, 27 M.J. at 633.

148. *See generally* Opinion 98/0728, Office of The Judge Advocate General, United States Army, subject: Proposed Change to Policy on Body Piercing and Earrings (20 Apr. 1998) (evaluating the overbreadth and vagueness issues of an Army draft provision of the body piercing and earring policy).

149. *See* June 98 Wear and Appearance Message, *supra* note 40; December Administrative Guidance, *supra* note 48.

150. *See* June 98 Wear and Appearance Message, *supra* note 40. Although the language of the policy allows for off-duty, off-base, and out of uniform wear of body piercings, the reality is that the policy will not allow for any body piercings. A piercing will close very quickly if the jewelry is removed–often within hours. In addition, the healing process with the jewelry in the piercing can take several months. Soldiers are not in an off-base, off-duty status long enough to allow for the piercing healing process to take place. *See also Sacred Heart Studio* (visited Mar. 20, 1999) <http://www.bodypiercing cam.com/basicheal.html> (indicating that piercings can take weeks to many months to heal depending on the location of the piercing).

151. *See* United States v. Wartsbaugh, 45 C.M.R. 309 (1972) (prohibiting the wear of a bracelet).

152. Goldman v Weinberger, 475 U.S. 503 (1986).

mined that appearance standards are constitutional even though the military fails to show that the policy regulated the service as intended.[153]

It is appropriate that the military have near-complete discretion to dictate how a soldier appears in uniform (and in civilian clothes to the extent that appearance somehow impacts a military interest). Uniformity is a desired end-state in a military environment.[154] This rationale becomes weaker, however, when the stated reason for the regulation is appearance, but what is actually regulated is not visible in uniform and does not affect appearance or duty performance.[155] Thus, in part, the Army's prohibition against body piercings, which cannot be seen when in uniform (or through the uniform), is overly broad if the policy is based on uniform appearance.[156]

The Army's new policy is also internally inconsistent. The first substantive provision of the body art policy prohibits body piercing.[157] A piercing can be placed almost anywhere on a body.[158] Piercings are commonly placed in the belly button, breast, face, or genital regions.[159] Given the possible locations of piercings, some may be covered or hidden by

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153. *See, e.g.*, United States v. Verdi, 5 M.J. 330 (C.M.A.) (1978) (addressing the length of hair and wig wearing standards). The appellant was convicted of wearing a wig while on duty, in violation of the Air Force regulation proscribing hairpieces. The Air Force uniform regulation provided that "wigs or hairpieces will not be worn while on duty or in uniform except for cosmetic reasons to cover natural baldness or physical disfiguration. If under these conditions a wig or hairpiece is worn, it will conform to Air Force standards." The Air Force's stated reason for the regulation was to promote the safety of property and persons. The Air Force failed to show that the regulation promoted safety of persons or property. *Id.*

154. *See* Parker v. Levy, 417 U.S. 733, 744 (1974); Greer v. Spock, 424 U.S. 828, 843-44 (1976) (Powell, J., concurring); *Goldman*, 475 U.S. 540 (citing Chappell v. Wallace, 462 U.S. 296, 300 (1983)). Justice Rehnquist stated in *Goldman* that "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Id.*

155. For example, a belly button or nipple piercing.

156. *See* Kelley v. Johnson, 425 U.S. 238 (1976) (holding that choice of appearance is an element of liberty).

157. June 98 Wear and Appearance Message, *supra* note 40. An exception is provided for females–females may wear one earring in each ear in accordance with *AR 670-1*.

158. There are many places on the body a person may receive a piercing. These locations include: the earlobe and helix (the upper part of the earlobe); the nostril and septum; the labret (anywhere the lips can accommodate a ring or stud); the tongue; the bridge of the nose; the tragus, antrilagus, crus, & triangular (other parts of the ear that are fleshy and protrude); the naval; the nipple; the labia or clitoris; the penis or scrotum. *Manchester and Leeds Piercing Company* (visited Oct. 30, 1998) <www.bodypiercing. co.uk/face.htm>.

clothing. From an appearance rationale, it seems contradictory, then, that the Army permits covered or discreet content-neutral tattoos and brands, yet does not permit covered or discreet content-neutral body piercings.

The policy also regulates off-duty wear of body piercings, perhaps under the guise of upholding appearance standards. Under the current policy, a female soldier in her quarters on post, in a leave status cannot wear two earrings in one ear.[160] In this case, the nexus to military appearance is weak. The Army has not established that body piercings are any more detracting from a soldierly appearance than a male soldier growing a scraggly beard while off duty or a soldier who simply has poor taste in his choice of clothing. To what extent the military can lawfully control a soldier's physical appearance off duty, while not in uniform, is a question that remains unanswered.

Even the Army's bright-line rule can cause overbreadth problems. Facial tattoos are strictly prohibited.[161] The Army policy has not taken into account cosmetic tattoos. Tattoos can be used as permanent eyeliner or permanent lip enhancer.[162] These tattoos clearly violate the letter of the current policy.[163] It seems somewhat severe, however, to separate someone from the Army or reject them for service on that basis.

Another overbreadth problem the Army may soon encounter is the recent trend towards another type of body art known as "henna."[164] Henna is a form of temporary tattoo that stays on the skin upwards of four weeks.[165] It may become even more prevalent in the military because it is

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159. *See* Alan Scher Zagier, *Fashion is Piercing at Durham Mall*, NEWS & OBSERVER (Raleigh, N.C.) Oct. 13, 1998, at B1.

160. *See* June 98 Wear and Appearance Message, *supra* note 40. Although this prohibition is not specifically stated in the policy, the policy prohibits any body piercings on-post, and off-duty, except for women who may one earring in each ear (male soldiers may not wear any earrings on-post and off-duty). *Id.* It appears then, by virtue of the policy, that the piercing "limit" on-post, at all times, for female soldiers is one earring in each ear.

161. *Id.* Acknowledging that facial tattoos are an issue, the Director of the Army Human Resources Directorate sated that "if permanent make-up conforms to standards of appearance for wearing make-up as described in *AR 670-1* (para 1-8b, p.12)." *See* Hot Topics, *supra* note 52, at 6. This guidance, however, raises an interesting issue. It seems to suggest that the letter of the body art policy is pliable enough to bend if another regulation allows for such conduct. For example, does this suggest that if the tattoo were a religious symbol, (which might arguably include extremist symbols), then because is would be allowed under the religious accommodation policy, it would not violate the body art policy? *See* 10 U.S.C.A. § 774 (West 1998) (providing for the accommodation of neat conservative wear of religious articles).

painless, inexpensive, removable, and arguably, not prohibited.[166] How the policy may be re-written to apply to temporary body art, remains to be seen.

b. Health and Safety

Another legitimate purpose of the new policy might be to mitigate potential health or safety risks associated with obtaining body art.[167] There

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162. Circumstances that motivate women to undergo this procedure include: active sports participation, allergies to make-up, oily skin which causes make-up to smudge and fade, difficulty applying make-up (poor vision, arthritis), and thinning or loss of one's eyebrows. Another reason for this procedure may be permanent tattooing of the reconstructed areola. Some patients desire the tattooing of discolored skin areas (usually congenital). *See* Richard L. Morris, M.D., F.A.C.S., *Medical Tattooing (Permanent Make-Up)* (visited Mar. 15, 1999) <http://rlmorrismd.com/tattoo.html> (providing information concerning the use of tattooing for eyeliner, eyebrows, or lip margins). *See also* New York State Nurses Association, *Tattoos: What Are the Health Risks*? (visited Jan. 19, 1999) <www.nysna.org/pages/news/connecion/tattoos.htm> (noting that tattooing can also supplement a person's natural attributes such as tattoos used on the face to accentuate eyebrows, eyelashes, or lips).

163. *See* June 98 Wear and Appearance Message, *supra* note 40. Along these same lines, tattoos on the neck or head are also prohibited. *Id.* Exceptions may arguably be reasonable in cases of tattoos in the hairline that are covered with hair.

164. Certain forms of tattooing are temporary. "Henna" is a method of temporary tattooing that originated in India. "Henna" is a "completely painless topical application of a plant extract which stains the skin. Like a tattoo, you may choose the placement and virtually limitless design possibilities. Henna stays on the skin between 2-3 1/2 weeks before it fades from your skin. It looks just like a real tattoo. The application of henna was brought to India by the Moghuls in the 12th century A.D. The use of Mehendi became a traditional aspect of Hindu wedding ceremonies. Before the marriage, all the women in the bridal party would have their hands and sometimes feet decorated. The bride usually receives the most elaborate designs which can extend from her fingertips to her elbows and toes to knees." The cost can range from $10 to $60 per piece or $30/hour for larger art. *Leslie's Henna Portfolio* (visited Jan. 16, 1999) <www.interlog.com/~passage/ henna/mainhtml> [hereinafter Henna Portfolio]. *See Primal Urge, Henna Body Art* (visited Jan. 16, 1999) <www.primal-urge.com/hennadis.htm> (noting the growing popularity of henna tattooing because it is temporary and painless). *See also* Suzanne Koudsi, *Ancient Ritual Becomes Trendy Body Art*, COLUM. NEWS SERVICE, Mar. 26, 1998 <http//moon.jrn.columbia.edu/CNS/mar26apr1/henna> (describing the hot new trend started in by women in Hollywood such as Madonna).

165. *See* Henna Portfolio, *supra* note 164.

166. *See generally* Henna Arts International, *Henna Mehndiwebring* (visited Mar. 19, 1999) <http://www.freeyellow.com:8080/members2/hennamehndi> (providing historical information on henna).

167. *See* United States v. Wheeler, 30 C.M.R. 387 (1961); United States v. Chadwell, 36 C.M.R. 741 (N.B.R. 1965) (refusing to obtain an inoculation against certain diseases).

are, in fact, serious health risks associated with both the tattooing and the body piercing processes.[168] Whenever the skin is punctured, there is potential risk of transmitting viruses.[169] Tattooing and body piercing with unclean needles or equipment can lead to the transmission of hepatitis B, hepatitis C, HIV infection,[170] and other possible blood borne diseases.[171] This risk is great because the Federal Drug Administration has not yet begun to regulate the dye used in tattoos or the equipment used to tattoo and body pierce.[172] Thus, there is no reliable way to ensure the equipment being used is clean.[173] Branding can also potentially cause serious infections, as can any burn to the skin.[174]

Health, however, does not appear to be the reason for the Army's new policy. If it were the primary concern, the policy would ban all forms of body art as a method of health risk prevention. The policy, however, does

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168. *See generally* Division Surgeon, Preventative Medicine, *Tattoos: It's Your Skin, Tattoos Can Carry Serious Risks*, SERVICE NEWS (visited Feb. 5, 1999) <www.tfeagle.army.mil/talon/sep19/story5.html>.

169. *Id.*

170. *See, e.g.*, Lieutenant Colonel (Dr.) Evelyn Bazzara, Preventative-Medicine consultant, Europe Regional Medical Command, Heidelberg, Germany, *Tattoos Linked to HIV*, SOLDIER MAG., Mar. 1999 (presenting story of two soldiers in the Balkans who possibly contracted HIV infection through being tattooed at a Hungarian tattoo parlor).

171. *See* Deborah Funk, *Silent Epidemic May Spread Faster than AIDS*, ARMY TIMES, July 6, 1998, at 6.

172. *Id.*

173. Safe piercing should be done with a new hypodermic needle. All the tools, jewelry, and packages should be autoclaved (clinically sterilized). The piercing process is simple and safe if done correctly. The area to be pierced should be cleaned with iodine solution and marked with a surgical marker in the place where the piercing will be placed. The area is held with either forceps or a receiver tube (depending on the piercing) to support the area to be pierced. The hollow hypodermic needle is punched through the marked spots. The jewelry, which has been placed at the back-end of the needle, is then pushed through the hole and into place. Precautions should be taken to avoid complications. These precautions include no alcohol 24 hours prior to the piercing; getting a good nights sleep and a good meal an hour before the piercing; and increasing Vitamin C and Zinc intake to speed the healing. *See Passage Piercing* (visited Jan. 16, 1999) <www.interlog.com/~passage/piercing/main.html>.

174. *See* Shannon Larratt, *BME Branding/Cutting/Scarring FAQ* (visited Mar. 15, 1999) <http://www.bme.freeq.com/scar/scar-faq.html#1-3>. The largest risk in the branding process is probably an aesthetic one, however, branding, cutting, and scarification is not a precise art, and according to the literature there are apparently only a few artists with a great deal of experience. There are risks of infection but as with other body art proper care minimizes the risk. Improper technique can be very dangerous. Even experienced branders have trouble getting consistent results. Because the largest risk is that it will look bad, or at least not like it was intended to, simple geometric designs are often used to minimize this problem. *Id.*

not ban all body art although the same health risks are associated with forbidden and allowed body art.

Safety may also be a legitimate purpose for prohibiting body piercing. An exposed body piercing may become caught on something on-the-job and cause an injury to the wearer by being pulled from the skin. Friction against the body piercing may also arguably cause some chaffing-type injury depending on where the piercing is located on the body. These injuries, however, are speculative. A body piercing covered by clothing probably has less of a chance of catching on something and causing injury to the wearer than does a wedding ring, necklace, or identification tags. In addition, in many cases piercings are flush to the skin because they are in the form of studs or ball ornaments. In those cases, the chances of the piercing being caught on something are arguably small.

Even if we assume that safety were the Army's concern, it is difficult to make the same arguments for prohibiting body piercing in a garrison environment or an off-base, off-duty situation as opposed to a field or training environment. Thus, from a safety perspective, the policy is overbroad.

c. Morale and Discipline

The need for harmony and close working relationships is of monumental concern in the military. The body art policy should consider the extent to which various forms of body art actually present a clear danger to discipline, morale, or mission. The military, however, should be "wary of regulations producing a misleading conformity and calm."[175] Regulations should be narrowly fashioned to address concrete Army concerns–not speculative ones.

As for tattoos and brands, the symbolism of the art should be a factor to consider when balancing free speech rights. Some body art, by virtue of its symbolism, may be of a nature to cause dissension among the troops,[176] while content-neutral art would not. Take as an example, an excessively

175. Brown v. Glines, 444 U.S. 348, 371 (1980). "The forced absence of peaceful expression only creates the illusion of good order: underlying dissension remains to flow into the more dangerous channels of incitement and disobedience. In that sense, military efficiency is only disserved when first amendment rights are devalued." *Id.* (Brennan J., dissenting).

176. For example, extremist, gang-related, or racist body art.

large tattoo normally covered by clothing, such as on the entire back. It is a tenuous argument that such tattoos are contrary to good order and discipline.

In the case of body piercings, the Army may have a similarly difficult time articulating how morale, good order, and discipline are affected. If the body art is content-neutral, and not visible in uniform, it is unclear how it would cause dissension among the troops. The Army could argue that possessing body art, in and of itself, must somehow affect morale, good order and discipline in a command because body piercing carries with it some negative stigma or connotation. This is a weak argument–especially given the increase in popularity of body piercings that brought about the recent changes in the Army policy.[177]

d. Public Perception

Another arguably legitimate reason for prohibiting body art is to protect the public's perception of the military.[178] The Army's concern in this regard is based on antiquated, hackneyed ideas about tattooed persons.

Tattooed persons have, in the past, been labeled by American society as the deviants of society.[179] This label was based primarily on the fact that tattoos were not traditionally a part of mainstream society.[180] Today, however, tattoos have moved from being traditionally unacceptable to a more socially accepted form of "art."[181] The same is true for body piercings, as is evidenced by the sheer volume of those obtaining them.[182] In some

177. Hoffman, *supra* note 15.

178. This argument is based on the Army's presumption that service members can somehow be distinguished from the rest of society when in civilian clothes in a way that the military would be associated with the body art they possess.

179. *See* William Taylor, *Tattoo* (visited Jan. 19, 1999) <http://miavx1.muohio.edu/~taylor1/bad.htmlx> (providing historical information about tattooing).

180. People with tattoos have been, however, viewed traditionally as "not wanting to take part in social order." During World War II, tattoos became a "signature" for military personnel. *Id.* According to this author, the most common tattoos displayed by military personnel are that of "Lady Luck," their unit, military division, and the American Eagle. *See* Taylor, *supra* note 179.

ways, then, possessing some forms of body art places military members in a more mainstream light.[183]

At least one recent case weakens the position that because body art has become more mainstream, it therefore is more acceptable.[184] The Seventh Circuit Court of Appeals found that the public's perception is sometimes a legitimate interest to protect when weighed against visible body art.[185] The government, however, should restrict speech no more than is "reasonably necessary to protect the substantial public interest to be protected."[186] The dispositive issue in any case should be whether the restriction bears a rational relation to a legitimate public interest. Given the breadth of the Army's body art policy, there remains a serious question as

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181. Some argue that tattoo art has moved from being socially deviant to being socially acceptable based on a shift in cultural values and aesthetic criteria. *See* Taylor, *supra* note 179. This can in part, be attributed to the fact that hippies from the late 1960s have now taken the seat in top positions in American society and many of them are tattooed. Those in power define mainstream social values transforming the tattoo into an accepted art form. *Id. See also* Neil Springer, *Artist's Approach to His Customers is Only Skin Deep*, CAPITAL DISTRICT BUS. REV. (Mar. 9, 1998). One tattoo artist had this to say about the professional/white collar clientele that come to his shop: "sales of [tattoos] are huge . . . [t]hey're weekend warriors, and tattooing is a form of self-expression for them. To them, a tattoo is freedom–the opposite of what they deal with all week." *Id.*

182. A study was recently conducted by Rutgers University to determine the characteristics of people who have body piercing, tattooing, and branding work performed. The study, published on 13 September 1996, indicated that college students who have their bodies pierced are just like the rest of us, other than having a few extra holes in their bodies. The study indicated that out of 790 persons who responded to the survey, 392 had possessed some form of piercing. The study found that pierced persons come from a variety of racial, cultural, and ethnic backgrounds. *See* Bekah Wilson, *Survey Say Pierced People are Normal* (visited Jan. 25, 1999) <www.ocoll.okstate.edu/issues/1996_Fall/960913/stories/piercing.html>.

183. The prohibition on certain forms of body art (such as indecent tattoos or body piercings) raises interesting questions about whether tattoos would remain a basis for rejection from the service if the draft were reinstated. Considering the recent trend towards obtaining body art, if the presence of body art remained a basis for rejection from service, there is the possibility that an enormous amount of recruits would be turned away. Consider that if such prohibitions were not necessary in time of war, why they would be necessary when maintaining a peacetime force.

184. Zyback v. Village of Peotone, 903 F.2d 510 (7th Cir. 1990). The Circuit Court in *Zyback* examined a police force regulation prohibiting male police officers from wearing ear studs in public, even while they are off duty. The court found that although two police had a liberty interest in their appearance, including an interest in wearing an ear stud for fashion reasons, the protection of esprit de corps of the police force, discipline and uniformity are legitimate interests outweighing the officers' interests. *Id.*

185. *Id.*

186. Brown v. Glines, 444 U.S. 348, 355 (1980).

to whether the body art regulation goes beyond what is necessary to protect the government's possible interest in presenting a positive public image.

2. Vagueness

The Army's body art policy is arguably constitutionally vague because it fails to provide fair notice of the prohibited tattoos and because it allows for arbitrary enforcement.[187] What is and is not vague is difficult to delineate.[188] A law is constitutionally vague if people of common intelligence must necessarily guess at its meaning and differ as to its application.[189] A law must be drawn with sufficient clarity of the proscribed

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187. *See* December 98 Administrative Guidance Message, *supra* note 48. In December 1998, the Army again published additional guidance on the new body art policy. This guidance gave more breadth to the policy. The guidance stated that the tattoo policy did not contain a "grandfather clause" that would allow exceptions for those members who obtained tattoos before the policy was promulgated. The December 1998 guidance provided criteria for commanders to determine prohibited tattoos and what to do in response to a violation. The message stated that examples of violations may include tattoos that: (1) show an alliance with extremist organizations, (2) are indecent, or (3) are unreasonably large or excessive in number. The policy was expanding.

188. Culver v. Secretary of the Air Force, 389 F. Supp. 331, 332 (1975). A helpful exposition of the vagueness doctrine can be found in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972):

> It is the basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that law give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory enforcement. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms.

Id.

conduct so as to inform persons of common intelligence and those given the responsibility to enforce it.[190]

The Army's body art policy contains ambiguous language.[191] This is of special concern because the Army's body art policy has a potential chilling effect on free speech.[192] The original guidance prohibits tattoos that are prejudicial to good order and discipline, and tattoos or brands that

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189. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (holding that vague statutes violate due process because they do not allow fair warning to those who are prosecuted under them). *See* United States v. Baker, 18 U.S.C.M.A. 504 (1969) (holding that rules of construction for statutes generally apply to regulations). The Supreme Court in *Parker v. Levy*, 417 U.S. 733, 752-57 (1974), held that Article 133, UCMJ, is not itself void-for-vagueness. The Court held that a specification alleging a violation of Article 133, UCMJ, (conduct unbecoming an officer and a gentleman, 10 U.S.C. § 933), is adequate for criminal prosecution if sufficient facts are pled which could reasonably be found to constitute conduct unbecoming an officer. *See* United States v. Norvell, 26 M.J. 477, 480 (C.M.A. 1988). In "determining the vagueness of a military disciplinary statute" under Article 133, one must analyze the alleged misconduct "to determine whether it is disgraceful and compromising as contemplated by the statute." United States v. Van Steenwyk, 21 M.J. 795, 801-02 (N.M.C.M.R. 1985). Criminal responsibility will attach where a reasonable man under the circumstances could reasonably understand that the statute proscribed that kind of conduct. *Id.* at 801.

190. *See* C. Thomas Dienes, *When the First Amendment is Not Preferred–The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779, 812 (1987) (citing *Smith v. Goguen*, 415 U.S. 556 (1974)) (holding a flag misuse statute unconstitutional).

191. December 98 Administrative Guidance message, *supra* note 48. In December 1998, the Army again published additional guidance on the new body art policy. This guidance gave more breadth to the policy. The guidance stated that the tattoo policy did not contain a "grandfather clause" that would allow exceptions for those members who obtained tattoos before the policy was promulgated. The December 1998 guidance provided criteria for commanders to determine prohibited tattoos and what to do in response to a violation. The message stated that examples of violations may include tattoos that: (1) show an alliance with extremist organizations, (2) are indecent, or (3) are unreasonably large or excessive in number. The policy was expanding..

192. *See* Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

> The danger that a statute with vague contours as to its coverage may silence some speakers whose messages would be entitled to constitutional protection under the Federal Constitution's First Amendment provides a further reason for insisting that the statute not be overly broad; a statute's burden on protected speech cannot be justified if such burden could be avoided by a more carefully drafted statute.

Id. The Supreme Court found that although the government had an interest in protecting children from potentially harmful materials, the statute in that case pursued that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive. *Id.*

detract from a soldierly appearance.[193] The phrase "detracting from a soldierly appearance" can vary in application.[194] Some conservative commanders might find the vast majority of tattoos and brands detract from a soldierly appearance while other more liberal commanders may interpret the policy more loosely. Take, for example, persons with decorative tattoo bands around the leg or arm.[195] Whether these tattoos violate the policy is unclear. Furthermore, the guidance does not sufficiently address other tattoos such as military tattoos that are unprofessional or distasteful and can be seen in Class A uniform.[196]

The Army recognized the potential problems with the original guidance and tried to limit the scope of application by providing additional guidance.[197] The later administrative guidance states that tattoos or brands "may" violate the new policy if they indicate an alliance with an extremist organization, are indecent,[198] or are unreasonably large or excessive in number.[199] This is helpful, but also problematic.

At first blush, the prohibitions against tattoos and brands that illustrate extremist-type affiliations seem simply applied. Problems may arise, however, when a soldier possesses a tattoo that to some people indicates

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193. December 98 Administrative Guidance message, *supra* note 48. The policy provides that having a *visible* tattoo is not necessarily a violation of the policy per se. It must also "detract from a soldierly appearance." *Id.*

194. The Supreme Court held in *Parker v. Levy* that Articles 133 and 134 were not void-for-vagueness under the due process clause of the Fifth Amendment, since each Article had been construed by military authorities in such a manner as to at least partially narrow its otherwise broad scope and to supply considerable specificity by way of examples of covered conduct. *Parker*, 417 U.S. at 752-57. In *Parker*, a physician, refused to obey orders to "train special forces aide men, and made public statements urging Negro enlisted men not to go to Vietnam if ordered to do so, and characterizing special forces personnel as liars, thieves, killers of peasants, and murderers of women and children." *Id.* at 733-34. In *Parker*, the defendant could have had "no reasonable doubt" that his conduct was clearly punishable by Articles 133 and 134, UCMJ. *Id.* In the case of tattoos, given the subjectivity of "detracting from a soldierly appearance," conduct that violates the tattoo policy will be much more difficult to pin down and agree on as opposed to the circumstances in *Parker* that made it a clear punishable violation.

195. For example, a tattoo ankle band or arm bands.

196. For example, a female ankle tattoo.

197. December 98 Administrative Guidance message, *supra* note 48.

198. The guidance provides that "indecent" tattoos or brands include those that are: grossly offensive to modesty, decency, or propriety; shock the moral sense because of their filthy, or disgusting nature; tend to incite lustful thought or tend reasonably to corrupt morals or incite libidinous thoughts. *Id.*

199. *Id.*

extremist affiliation, but to the soldier means something else.[200] Unless a soldier is actually involved in extremist or gang-related activities, it would be safe to assume that ordinarily a soldier would not know what symbols were associated with gang-membership or extremism. Take, for example, a symbol like the Celtic cross. Celtic symbols are noted in Army literature as possible symbols of neo-nazi or skinhead affiliation.[201] To an Irish Christian, however, the Celtic symbol can symbolize Nordic heritage or religious eternal faith.[202] Given the ambiguous guidance, the Army may discipline soldiers or bar them from service in cases where they have done nothing to discredit the Army.[203] Problems such as this allow for potential misinterpretation or oversimplification on the part of commanders. The policy is arguably too subjective and opens the door for possible abuse through expansive interpretation.

Another problem the policy presents is its use of the term "indecent," which is much broader than obscenity.[204] This standard silences some

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200. *See* Hudson Interview, *supra* note 29. Major Hudson said that it is very important (and sometimes difficult) to distinguish between tattoos that indicate a pride in cultural heritage (such as black power) verses tattoos that advocate extremism (such as white supremism). Take for example the numerous rangers at Fort Lewis who rushed to cover up otherwise legal tattoos out of fear. One magazine noted that several Army Rangers in the Fort Lewis area sought immediate assistance at laser treatment centers to remove old ranger tattoos. They feared that tattoos of double lightening bolts would be taken as racist because the design was used by Nazi troopers in World War II. *See, e.g.*, *Tattoo Parlors Cleaning Up Around Fort Lewis*, COLUMBIAN (Tacoma, Wash.), Aug. 7, 1997, at B2.

201. *See* Combating Terrorism Handbook, *supra* note 35.

202. *See The Celtic Lady's Shop* (visited Mar. 20, 1999) <http://www.celticlady.com/celt-art.htm> (describing Celtic art as "the Work of Angels" by Gerald of Wales). Celtic art immerged in the La Tène culture (ca. 5th century B.C.) in parts of Germany, eastern France and surrounding areas of middle Europe by a small band of tribes. Julius Ceasar's Roman armies were not able to conquer and Romanize the tribes of Ireland so Celtic art and traditions were safeguarded for future generations. Celtic Art incorporates nature with geometric spirals, key work designs and intricate knot work. Celtic knot work painstakingly laps one or more line over and under other lines in the belief that each crossed line will add powerful protection to the wearer. *Id.*

203. At least two cases were raised where soldiers possessed tattoos that were associated with skinhead neo-Nazi groups and the soldiers denied having knowledge of the symbolism of the tattoos. One situation involved a noncommissioned officer with 17 years service who had several tattoos that were allegedly associated with skinhead groups. He explained that the tattoos were symbolic for his Nordic heritage. The NCO's unit attempted to process him for an administrative discharge, but the discharge was rejected by the Assistant Secretary of the Army for Manpower and Reserve Affairs. *See* Smidt Interview, *supra* note 34. The other incident involved a Reserve Officer Training Corps (ROTC) cadet who was denied a commission because he had a "spider-web" tattoo on his elbow. The cadet denied he was affiliated with skinhead groups. Kash Interview, *supra* note 36.

speakers whose speech would be entitled to constitutional protection. The term indecent can be interpreted differently by commanders. Commanders' sensibilities vary greatly, as can commanders' tolerances and tastes. This could potentially lead to disparate outcomes in similar cases.

The Army policy also restricts tattoos that are "unreasonably large or excessive."[205] The reason for this prohibition is unclear in cases where the excessively large tattooed area is normally covered by the uniform. For example, if a soldier possesses non-extremist, decorative tattoos that cover his entire back or an entire limb, this violates the letter of the policy.[206] It is arguably a drastic measure to prevent such a person from serving in the Army solely on that basis.

Simply put, these guidelines are not easy for commanders to apply. The Army policy, as currently written, runs the risk of impermissibly chilling soldiers' First Amendment rights because it prohibits both unprotected speech and protected speech.[207] Hence, the body art policy fails on that point.

C. Difficulties With Enforcement

The current Army policy fails to adequately guide commanders faced with enforcing the new body art policy.

1. When is Adverse Action Warranted?

Commanders need clearer guidance concerning what to do with those soldiers who violate the Army body art policy. Commanders need to understand when and if a soldier should be barred from re-enlisting,

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204. *See* Carey v. Population Services Int'l, 431 U.S. 678, 701 (1977) ("Where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

205. December 98 Administrative Guidance Message, *supra* note 48.

206. *Id.* The guidance provides as examples of excessive tattoos those that "cover one limb."

207. *See, e.g.*, Rob Carson, *Take It Off, and Hurry, Tattooed GIs Plead/Soldiers Responding to Fort Lewis Crackdown Discover Process is Neither Quick Nor Inexpensive*, NEWS TRIB. (Tacoma, Wash.), Aug. 2, 1997, at A1. Soldiers were rushing to have tattoos removed or changed after Fort Lewis instituted its inspection policy. One laser treatment center in the area said it was fielding hundreds of calls a day regarding tattoo removal. *Id.*

administratively separated from the Army, or legally ordered to remove the tattoo art. The Army's guidance does not adequately instruct commanders.[208]

If a commander determines that a soldier's body art is unauthorized under the guidance, the question remains: is the mere presence of such body art a sufficient basis to administratively separate a soldier from the Army.[209] To date, the Army has not discharged any soldiers under the current policy.[210] The language of the policy suggests that simply possessing an unacceptable tattoo and refusing to have it surgically removed can be enough justification for separation.[211] The guidance does not state what authority is used to separate a soldier if a commander finds a body art violation, and the soldier refuses to comply with the uniform policy.[212]

Making the matter more confusing, the policy instructs commanders not to order the soldier to remove a tattoo or brand.[213] Soldier "counseling," is instead the mandate.[214] Because a commander cannot order a sol-

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208. December 98 Guidance Message, *supra* note 48.

209. The Director, Army Human Resources Directorate provided the following guidance in response to the question as to what to do if a soldier is unwilling to have an offending tattoo removed: (1) make sure the soldier understands the Army tattoo policy, (2) give the soldier the opportunity to seek medical advice about tattoo removal and the associated risks, (3) counsel the soldier that he or she is not in compliance with Army policy, (4) state on the counseling form that the soldier's decision not to have the tattoo removed could result in adverse administrative action, to include discharge from the Army, and (5) battalion commanders will make the decision about which tattoos are not in compliance with Army tattoo policy. *See* Hot Topics, *supra* note 52, at 7.

210. Wood Interview, *supra* note 43. At least one ROTC cadet, however, was denied a commission as an Army officer because he possessed alleged racist tattoos. *See* Kash Interview, *supra* note 36. Before instituting the new body art policy, one soldier separation was attempted by the I Corps command and rejected by the ASA (M&RA). *See* Smidt Interview, *supra* note 36.

211. December 98 Administrative Guidance Message, *supra* note 48. The guidance states:

> Commanders may encounter circumstances in which soldiers refuse to have a tattoo or brand removed. The following guidance applies and should be considered: (A) [e]nsure the soldier understands the policy, (B) [e]nsure the soldier has the opportunity to seek medical advice about the process, (C) [c]ounsel the soldier in writing that he or she is not in compliance with Army policy. The counseling will state that the soldier's decision not to have the tattoo or brand removed could result in adverse administrative action, *to include discharge from the Army.*

Id. (emphasis added).

dier to remove the tattoo, the only basis for administrative discharge is the possession of a tattoo that violates the policy, apparently coupled with the soldier's refusal to remove the tattoo after receiving "counseling" about the Army's tattoo policy and tattoo/brand removal.[215] Oddly enough, the outcome of the tattoo policy is more severe than the Army's extremist policy itself.[216]

The policy does not address whether a commander's discretion allows for any exceptions to the policy.[217] Can a higher commander in the chain-of-command determine that a soldier's body art does not detract from a soldierly appearance once a subordinate commander determines that it

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212. *See* Hot Topics, *supra* note 52, at 7. The Director of the Army Human Resources Directorate provided that "[t]he command may find it necessary to take administrative action. For example, the commander may bar reenlistment and possibly recommend separation of the soldier who refuses to remove the offending tattoo. But in most cases, we do not recommend giving a direct order to remove the tattoo." *Id.* The Army may also attempt to administratively separate a soldier under the Secretary of the Army's authority to discharge a soldier for the good of the service as was attempted at Fort Lewis. *See* Smidt Interview, *supra* note 36; Kash Interview, *supra* note 36.

213. *See* December Administrative guidance, *supra* note 48.

214. *Id.*

215. *Id. See* AR 670-1, *supra* note 3. The uniform regulation is not, in and of itself, a punitive regulation. In other words, soldiers are not ordinarily disciplined for merely violating the uniform regulation. Soldiers are normally disciplined (whether punitively or administratively) for uniform violations if they are given an order to comply with a non-punitive regulation and subsequently fail to do so. The basis for the adverse action becomes the refusal to obey an order to comply–not the rogue failure to comply with the uniform regulation.

216. The Army's recently implemented extremist policy, embodied in *AR 600-20*, paragraph 4-12C.2.E eliminated the "active" and "passive" distinction between a soldier's involvement in extremist activities seemingly giving more discretion to commander to decide what actions could "threaten good order and discipline." *See* AR 600-20, *supra* note 109. One scholar interpreted the new policy's language, however, to focus its prohibition on "participation in organizations and activities, not mere beliefs." *See* Hudson, *supra* note 11, at 40. When the Army's extremist policy is read in this way, the scholar submits that "[a] soldier who is a 'mere' member but does not act, distributes no literature, or propogates no views, cannot be prohibited from being a member [in an extremist organization]." *Id.* In other words, mere beliefs are not prohibited–but actions are. *Id.* Juxtapose this interpretation of the Army's extremist policy with the Army's new tattoo policy, which arguably prohibits beliefs without activities.

217. *Id. See supra* note 143 discussing religious accommodation procedures.

does detract? Can a board retain a soldier despite the soldier's body art? Again, these remain unanswered questions.

The Army's uniform regulation is not punitive.[218] A commander must, therefore, base most punitive actions for uniform violations on the soldier's violation of the commander's order to comply with the regulation. This raises the next issue.

2. Can Commanders Force Soldiers to Remove Body Art?

Perhaps one of the more disconcerting parts of the new body art policy is the expectation that a soldier remove his tattoo or brand, or face adverse action.[219] It seems overly intrusive to force soldiers in all cases to remove body art.[220] Although the Army's policy provides that commanders are not to order soldiers to remove tattoos and brands,[221] the Army now places soldiers in a position wherein they must choose between ending their career or removing the tattoo. This is not a voluntary choice.

After the Army promulgated the initial change to the uniform regulation, many commanders in the field requested guidance concerning tattoos and brands.[222] Subsequent guidance provided that if the soldier chose to have the tattoos removed, the Army's medical command would assist in removing them.[223] This raised another series of concerns regarding removal procedures and practicalities.

In the case of a body piercing, removal is simple and painless. Other forms of body art, however, present more difficulties. Removal of tattoos and brands[224] is expensive, time consuming, and painful.[225] The military is now faced with spending time and scarce resources to meet the new policy requirements. The medical command must provide both equipment and trained doctors to perform the necessary removals. Soldiers will spend

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218. AR 670-1, *supra* note 3.

219. December 98 Administrative Guidance Message, *supra* note 48.

220. *But cf.* The Army Immunization Policy, *supra* note 9 (wherein the Army can force a soldier to obtain an immunization).

221. December 98 Administrative Guidance Message, *supra* note 48.

222. *See, e.g.*, Memorandum, Captain Karl Kronenberger, AFCG-JA-MIL, subject: Problems in the Implementation of the New Policy (1 Oct. 1998) (on file with the author). This memorandum to the Forces Command (FORSCOM) Staff Judge Advocate was drafted by an administrative law attorney assigned to FORSCOM. It outlined the numerous issues raised by the body art policy. The issues were based on questions from the field.

an enormous amount of time being counseled about body art removal, receiving medical care and recovering from the removal procedures, pre-

223. December 98 Administrative guidance message, *supra* note 48. The policy states:

> The medical command will remove such tattoos or brands when the soldier requests assistance in removal and the soldier is command-referred. However, after the date of this message, the Army may elect not to provide this service for any soldier who voluntarily has a tattoo or brand applied which is in violation of this policy.

Id. This policy was an attempt to alleviate the problems caused by the original policy that left the soldier to figure out how to pay for a removal and where to have it done. According to medical personnel in Germany, this is simply not happening in USAEUR. *See* Hudson Interview, *supra* note 29.

224. Hypertrophic (raised) scars and keloids (excessive accumulations of scar tissue caused by raised and thickened masses of connective tissue scars) are difficult to treat, with recurrences commonly seen after such treatments as cryosurgery (freezing), excision, radiotherapy (x-rays), and steroid injections. Current laser technology allows for the improvement of such scars by normalized skin texture and color after laser treatment. *See* Tina S. Alster, MD, *The Washington Institute of Dermatologic Laser Surgery* (visited Mar. 23, 1999) <http://www.skinlaser.com/scars.htm>.

225. Although obtaining a tattoo is relatively inexpensive, removing it can be is extremely costly–especially to an average enlisted soldier. Tattooing was once considered "permanent" because, left alone, most tattoos will remain indefinitely on the skin. Over the years, however, several techniques have been developed to remove tattoos. These techniques include: surgery (cutting the tattoo out of the skin), dermabasion (sanding away layers of skin with a wire brush until the coloring is removed), salabrasion (soaking the tattoo out with a salt solution), scarification (using an acid solution to burn off the tattoo and replace it with a scar), and various laser removal techniques. *See* Benjamin Walker, Ph.D., *Re: How Do You Take A Tattoo Off Your Body?* (visited Jan. 19, 1999) <www.madsci.org/posts/archives/mar97/859231293. Me.r.html>. *See also Arbutus Laser Center-Tattoo Removal* (visited Jan. 19, 1999) <www.infinity.ca/arbutuslaser/skincond.htm>. The chances of scarring are under five percent and the treatment does not require anesthetic. Arbutus states that tattoos may require two to eight or more treatments for removal to be complete. The factors affecting the amount of treatments include the size, location, and depth of the tattoo.

sumably in a non-deployable status. Lastly, there is no guarantee the removal process will completely remove a tattoo or brand.[226]

3. Can Soldiers Cover the Body Art as an Option?

The policy does not address whether covering a tattoo may be an option. Covering the tattoo may constitute a less intrusive means of meeting policy objectives.

Covering the tattoo can be done through a few methods. The first method is to cover the tattoo with clothing. This is a possible concern for females who have tattoos on their legs or ankles that would be visible when wearing the Class A skirt. The prohibitions on some tattoos apply when tattoo is visible in Class A uniform.[227] The tattoo policy does not define what constitutes the Class A uniform for females.[228] This begs the question: can commanders direct females to wear military slacks instead of the skirt to cover unprofessional tattoos that "detract from a soldierly appearance?"

Another method to cover the tattoo is with make-up or an adhesive strip. If a soldier can adequately cover the tattoo, it seems to be an ade-

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226. *See Skin Ovations* (visited Dec. 15, 1998) <www.skinovations.com/tattoos.html> (indicating that no laser removal system is guaranteed to remove all ink). Some laser systems permit the "removal of most ink tattoos with a very low risk of scarring." *Id.* Depending on what process is used, the laser could be particularly effective in the removal of blue, black, or red inks. Laser techniques remove the ink with the energy of light that cause the ink to destruct. The ink is then removed naturally by the body's filtering system. The laser systems emit energy impulses similar to "the snap of a rubber band or hot bacon grease on the skin." Green and yellow inks are most difficult to remove.

227. December 98 Administrative guidance message, *supra* note 48. It is interesting that the Army chose the Class A uniform as the appropriate measuring stick for when body art detracts from a military appearance. It would seem that the same concerns exist when a soldier is wearing a physical training uniform as when they are wearing the Class A uniform.

228. *Id. Compare* Message, 171800Z 2 Nov 98, Colonel Donald W. Tarter, Director, Recruiting Operations, U.S. Army Recruiting Command, subject: Tattoo Policy Update (providing that Class A uniform for females as described in the new Army body art policy includes the skirt). Applicants who have exposed tattoos in Class A uniform (include the skirt for females) must have a determination as to their enlistment qualifications. Determinations are then forwarded to Headquarters, U.S. Army Recruiting Command (USAREC) for review. *Id.*

quate substitute for removal. The least restrictive means should be used to accomplish the desired military end.[229]

4. Are Searches for Body Art Permitted?

Another potential problem commanders have is how to enforce the policy.[230] For the body art prohibitions to be effective, there arguably must be some system in place to enforce it.[231]

Currently, before a soldier enters the service, he is screened for physical markings.[232] The body art prohibition and the minimum entry medical standards are used as a basis to deny entry to those who do not meet policy standards.[233] This system is an effective means of controlling the body art of those not yet in the service.

The Army could incorporate "body art inspections" into their periodic physical examination process, which was done at Fort Bragg and Fort Lewis.[234] This may not be the best approach. Not only do such inspections raise possible constitutional issues,[235] but such inspections take an enor-

229. For example, a tattoo could be covered by super-imposing another tattoo on top of the unauthorized tattoo. This option may seem like an odd choice, but if a soldier would rather obtain a cover-up tattoo versus undergoing a tattoo removal process, this should be an option.

230. *See, e.g.*, Gerry Gilmore, *A Piercing Issue* (visited Mar. 22, 1999) <http://fludzone.net/wwwboard/ messages/145.html>. In this article, Master Sergeant Debra Wylie, the Uniform Policies Officer at the Army Office of the Deputy Chief of Staff for Personnel, suggested that one method of enforcement should fall on the soldier's shoulders. She said that "[j]unior soldiers considering getting a tattoo should "just exercise common sense . . . and first ask their noncommissioned officers which type of tattoos aren't appropriate according to *AR 670-1*." *Id.* Such a request for guidance on appropriate tattoos arguably is an inappropriate prior restraint on constitutionally protected speech.

231. The standard to date for soldiers already in the Army has been to refrain from conducting inspections unless evidence exists to indicate that there is some reason to conduct an inspection.

232. *See* AR 40-501, *supra* note 39.

233. *Id.*

234. To be judicially enforceable, the local regulation must not be arbitrary or unreasonable. *See* United States v Green, 22 M.J 711, 718 (C.M.A. 1986) (holding that the Fort Stewart regulatory proscription prohibiting soldiers from "[h]aving any alcohol in their system or on their breath during duty hours," as invalid, unenforceable, and essentially standardless, arbitrary, unreasonable, and "serving no corresponding military need not better satisfied by statutes and regulations of greater legal dignity") *See also* United States v. Cowan, 47 C.M.R. 519 (ACMR 1973); United States v. Garcia, 21 M.J. 127 (CMA 1985).

mous amount of time and resources away from the military mission and yield low returns in terms of finding violators.[236]

IV. How to Improve the Current Army Policy

The Army has taken on a great challenge in its attempt to regulate body art. Keeping track of what a soldier does to his body is no easy task. No policy will please everyone. The best approach to the body art concern is to fairly, reasonably, and logically balance the needs of the Army against the personal rights of soldiers. This balancing approach will reveal the legitimate purposes for prohibiting some forms of body art while allowing other forms.

The Air Force policy is arguably the better model balancing personal freedoms and rights and the need for a regulated military appearance.[237] The Air Force policy can be summarized in one concept: if the body art is

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235. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the things to be seized.

U.S. CONST. amend. IV. Courts, however, have consistently upheld health and welfare inspections as valid and constitutionally permissible. There are few limitations in this area as long as the inspection relates to military mission. *See* Unger v. Ziemniak, 27 M.J. 349 (C.M.A. 1989). A Navy lieutenant challenged the Navy directive that called for "direct observation" of the private parts of a person giving a urine sample. The lieutenant claimed that she had a constitutional right to privacy and to be free from unreasonable searches and seizures. She argued that because she had to urinate in front of an enlisted soldier, the direct observation demeaned her in status as an officer. The court found that although it was unpleasant and disagreeable to urinate while being directly observed by someone, there are cavities in the body where urine may be hidden for the purposes of substitution in the event of a drug test. Thus, the "direct observation" method was necessary to achieve the overall objective of ensuring that such a tactic would not be used. "Because the impact of drug abuse on the performance of military mission, we believe mandatory drug testing in the military community is not subject to the same limitations that would be applicable in the civilian society." *Id. See also* Chappell v. Wallace, 462 U.S. 296 (1983); Goldman v. Weinberger, 475 U.S. 503 (1986); Solorio v. United States, 483 U.S. 435 (1987).

236. *See* Kash Interview, *supra* note 36.

not visible in uniform and does not in some way affect duty performance, then it will be allowed.[238]

To make the Army policy less open to criticism, the Army should allow for some exceptions to the current prohibitions. For example, at a minimum, an exception for small inconspicuous cosmetic facial tattoos should be included in the policy. The Army should also consider allowing possible religious exception, which the current policy does not provide.

The Army should more clearly articulate what constitutes "excessive" tattooing, and consider why such restrictions are even necessary if tattoos are located in inconspicuous locations. The Air Force policy applies "excessive" tattooing to exposed body parts.[239] The Army defines "excessive" tattooing to body parts–including exposed and unexposed. The Air Force's more restrictive approach seems more reasonable.

The Army should also consider appropriate occasions when body art removal is necessary and proper.[240] Along the same lines, commanders

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237. *See* AF/JAG Memorandum for all Staff Judge Advocates, Harlan G. Wilder, Chief, General Law Division, OTJAG , HQ USAF/JAG, subject: Air Force Policy on Tattoos and Body Piercing, (undated). This memorandum states:

> Based upon the personal nature of tattoos and body ornaments, we anticipate the new policy may generate some controversy and media attention. However, we believe the policy strikes a reasonable balance between individual rights and the need for public confidence in the Air Force based upon a member's personal appearance. Although the specific rules on tattoos and body piercing are new, they are in line with other dress and personal appearance standards that have existed since our Armed Forces were first established.

Id. The memorandum also emphasized that commanders may also "impose more restrictive standards for tattoos and body piercing in situations where the Air Force-wide standards may be inadequate because of host country sensibilities or unique circumstances surrounding the mission." *Id.* In those circumstances, commanders should be able to "articulate a rational basis for more restrictive rules." *Id.*

238. *See Air Force Writes the Book On Body Art*, AIR FORCE NEWS, June 10, 1998. The Air Force "has recognized the increasing popularity of body art and have adjusted personal appearance policy to set appropriate guideline for such practices." *Id.*

239. AIR FORCE DRESS CHANGE, *supra* note 62.

240. *See, e.g.*, AIR FORCE DRESS CHANGE, *supra* note 62. The Air Force allows large tattoos that can be covered with clothes. Air Force members are not forced to remove tattoos in such cases.

need clearer guidance on what steps commanders should take to process a soldier for inappropriate body art.

V. Conclusion

Freedom of choice is the bedrock of the United States. Soldiers, the keepers of America's freedoms, should be mindful that Army policies are not unnecessarily restrictive based merely on the personal preferences or distastes of those charged with making the rules.

In large part, the body art policy is necessary. The Army, however, could lose good soldiers and potential recruits through an overly-restrictive body art policy.[241] During a difficult period for recruiting and a worse period for solider retention, the Army need not give soldiers one more reason to avoid military service.[242]

A careful analysis of the new body art policy reveals that, in part, the Army has gone too far. The goals of controlling soldier appearance,

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241. The Chief of Plans, Policy, Programs and Waivers Division, Headquarters, U.S. Army Recruiting Command, Fort Knox, Kentucky, indicated that out of every one hundred tattoos reviewed by recruiters, seven or eight prospective recruits are denied entrance into the service based on the new tattoo policy. *See* Gerry J. Gilmore, *A Piercing Issue* (visited Mar. 15, 1999) <http://fludzone.net/wwwboard /messages/ 145.html> (indicating that the same criteria is used by the Army recruiting command).

242. Recent reports indicate that the military is having a difficult time both recruiting new members and retaining current members. *See Statement by Congressman Steve Buyer Before the House Armed Services Committee Military Personnel Subcommittee*, FEDERAL NEWS SERVICE (Mar. 18, 1999). There is no question that the services face an incredibly difficult recruiting environment. Congressman Buyer indicated that the Army and the Air Force both project failed recruiting years in fiscal year 1999 and are expecting to violate the law by coming in under the end strength floors set by Congress. In the same vein, after a disastrous recruiting year in fiscal year 1998, the Navy is recovering but still not confident that the recruiting mission will be achieved. *See also Army Putting Fresh-Faced Soldiers In Recruiting Offices*, BUSINESS NEWS (Feb. 11, 1999).

> In the first fiscal quarter for the year, the Army fell behind its goal by about 2400 recruits. At that rate, the Army could fall far short of its goal of 74,5000 recruits. The Army also is working harder to keep new recruits. The rate at which soldiers in their first enlistment quit the service rose to 40% last year.

Id.

health, morale and welfare, and public perception are worthy and necessary–but only when legitimate military interests are at stake.

JUSTIFICATION FOR UNILATERAL ACTION IN RESPONSE TO THE IRAQI THREAT:

A CRITICAL ANALYSIS OF OPERATION DESERT FOX

CAPTAIN SEAN M. CONDRON[1]

I. Introduction

On 16 December 1998, the United States and Great Britain began a four-day air campaign against Iraq.[2] The operation, code named Desert Fox, was the most robust military action against Iraq since the end of the Persian Gulf War in 1991.[3] The confrontation was a result of Iraq's failure to comply with United Nations resolutions.[4] Although there was a consensus in the international community that the President of Iraq, Saddam Hussein, violated United Nations resolutions, there was not a consensus as to whether the United States and Great Britain would be justified in resorting

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2. Steven Lee Myers, *U.S. and Britain End Raids on Iraq, Calling Mission a Success*, N.Y. TIMES, Dec. 20, 1998, at 1, 20 [hereinafter Myers, *U.S. and Britain End Raids*]. This article analyzes the United States justification for the attack. Although Great Britain participated in the air strikes, this article does not attempt to analyze the British justification for the attack. The attack was a united effort between the United States and Great Britain, therefore the effort is labeled unilateral rather than bilateral or multilateral.

3. *See* Francis X. Clines & Steven Lee Myers, *Impeachment Vote in House Delayed as Clinton Launches Iraq Air Strike, Citing Military Need to Move Swiftly*, N.Y. TIMES, Dec. 17, 1998, at A1, A14 (stating that although the administration launched two previous strikes on Iraq in July 1993 and September 1996, Desert Fox was the largest military operation against Iraq since the Persian Gulf War).

4. *See id.* at A1 (stating that President Clinton ordered the attacks because Iraq failed to allow the United Nations Special Commission to carry on its work disarming Iraq as the government had agreed to do at the end of the Persian Gulf War in 1991).

to military action to enforce the United Nations resolutions.[5] In fact, of the five permanent Security Council members, only the United States and Great Britain favored military action.[6] Russia, France, and China were vocally opposed to any military action.[7]

This article addresses the legality of Operation Desert Fox in the context of the international legal system. The United Nations Charter, to which all parties involved in this conflict are signatories, prohibits the use of force except under two narrow exceptions. Part II of this article describes the events that resulted in American and British air strikes. Part III explains the international law as it pertains to the situation. Parts IV, V, and VI explain the theories for justification based on anticipatory self-defense, reprisal, and material breach of Resolution 687, respectively. Finally, this article concludes with a discussion about the legality of the United States attack on Iraq. The first step in the analysis, however, is to understand the crisis and the events that lead the Clinton administration to believe military force was the best solution to deal with the Iraqi government.

II. Crisis Development

A. Persian Gulf War

The road leading up to this confrontation spanned nearly eight years of conflict between Iraq and the international community. On 2 August 1990, the Iraqi Army, at the direction of Saddam Hussein, invaded the neighboring state of Kuwait.[8] The invasion of Kuwait was a direct result of a long-running dispute over the sovereignty of Kuwait.[9] Iraq made several additional claims: Kuwait illegally removed $2.4 billion worth of Iraqi crude oil by "slant drilling" into the Rumaila oil field; Kuwait ille-

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5. *See* Barbara Crossette, *As Tension Grows, Few Voices at U.N. Speak Up for Iraq*, N.Y. TIMES, Nov. 13, 1998, at A1, A14 [hereinafter Crossette, *As Tension Grows*] (stating that few countries are voicing support for the Iraqi defiance of the United Nations and many are saying that Iraq is fully responsible for any military action resulting from the crisis).

6. Steven Erlanger, *U.S. Decision to Act Fast, and Then Search for Support, Angers Some Allies*, N.Y. TIMES, Dec. 17, 1998, at A14.

7. *See id.* (finding that China, France, and Russia criticized the United States for the attack on Iraq).

8. THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996 at 14, U.N. Doc. DPI/1770, U.N. Sales No. E.96.I.3 (1996).

9. *See id.* at 12-14.

gally occupied the islands of Warba, Bubiyan, and Failaka in the Persian Gulf, blocking Iraqi access to the Gulf; and the Organization of Petroleum Exporting Countries (OPEC) breached export quotas.[10]

Although the invasion caught the international community off guard, the condemnation rapidly followed. Within a few hours of the Iraqi invasion, the United Nations Security Council adopted Resolution 660 in which it condemned the invasion and demanded an immediate withdrawal of Iraqi forces from Kuwait.[11] Over the course of the next four months, the international community, through the conduit of the United Nations, diplomatically attempted to force an Iraqi withdrawal from Kuwait.[12] During this time, the Security Council adopted ever more forceful resolutions to back up this diplomatic effort.[13] Finally on 29 November 1990, the Security Council adopted Resolution 678.[14] This resolution authorized member states "to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent resolutions and to restore international peace and security to the area."[15] This resolution would become effective after 15 January 1991, if continued diplomatic efforts failed to force Iraq out of Kuwait.[16] Following Resolution 678, diplomatic efforts continued up until the night of 15 January 1991, but the international community failed to achieve a diplomatic solution to the standoff.[17]

On 16 January 1991, the coalition arrayed against Iraq launched an aerial bombardment and, on 24 February 1991, ground maneuvers began.[18] In one of the most overwhelming military defeats in history, the

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10. *Id.* at 14.

11. S.C. Res. 660, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/660 (1990).

12. *See* THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 17-18, 21-22.

13. *See* S.C. Res. 661, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/661 (1990); S.C. Res. 662, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/662 (1990); S.C. Res. 664, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/664 (1990); S.C. Res. 665, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/665 (1990); S.C. Res. 667, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/667 (1990); S.C. Res. 670, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/670 (1990); S.C. Res. 674, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/674 (1990). *See also* THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 15, 17, 20-22.

14. S.C. Res. 678, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/678 (1990). *See also* THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 22. The vote in the Security Council for Resolution 678 was twelve in favor, two against (Cuba and Yemen) and one abstention (China). *Id.*

15. S.C. Res. 678, *supra* note 14, at 1.

16. *Id.*

17. *See* THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 25.

coalition forcefully removed Iraq from Kuwait.[19] On 27 February 1991, Saddam Hussein agreed to abide by all Security Council resolutions including the demand to remove all Iraqi forces from Kuwait and rescind all Iraqi claims to the territory of Kuwait.[20]

B. Cease-Fire Agreement

On 2 March 1991, the Security Council passed Resolution 686.[21] This resolution was a provisional agreement to end the hostilities between Iraq and the coalition.[22] Under Resolution 686, all twelve of the previous Security Council resolutions pertaining to the Iraqi crisis remained in full effect.[23]

Resolution 686 provided an opportunity for the Security Council to draft and to pass the formal cease-fire agreement, Resolution 687.[24] The Security Council passed Resolution 687 on 3 April 1991, officially ending

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18. *See id.* at 25, 27. The coalition consisted of sixteen countries to include the United States, Great Britain, France, Saudi Arabia, Kuwait, Egypt, Morocco, Syria, Bahrain, Oman, Qatar, United Arab Emirate, Bangladesh, Niger, Pakistan and Senegal. DILIP HIRO, DESERT SHIELD TO DESERT STORM: THE SECOND GULF WAR xxii-xxiii (1992). These countries had ground troops in Saudi Arabia on 13 January 1991, right before the war began. *Id.*

19. *See id.* at 27.

20. *See id.* at 28.

21. S.C. Res. 686, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/686 (1991).

22. *See* THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 29.

23. *Id.*

> The Security Council,
>
> Recalling and reaffirming its Resolutions 660 (1990), 661 (1990), 662 (1990), 664 (1990), 665 (1990), 666 (1990), 667 (1990), 669 (1990), 670 (1990), 674 (1990), 677 (1990), and 678 (1990),
>
> . . . .
>
> Acting under Chapter VII of the Charter,
>
> 1. Affirms that all twelve resolutions noted above continue to have full force and effect . . . .

S.C. Res. 686, *supra* note 21, at 1.

24. *See* S.C. Res. 687, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/687 (1991); THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 30.

the hostilities in the Gulf and returning Kuwait to the free and sovereign status it held before Iraq's invasion.[25] This resolution was a very detailed document delineating steps Iraq had to take to restore Kuwait's freedom and ensure long-term peace and security in the region.

As part of this resolution, the Security Council required Iraq to dismantle and to destroy all weapons of mass destruction (WMD) in its arsenal and the means by which Iraq could deliver those weapons.[26] This measure sought to dismantle Iraq's nuclear, biological, and chemical weapons program, as well as a large part of the Iraqi missile capability. To ensure compliance with this portion of the resolution, the Security Council established the United Nations Special Commission (UNSCOM) to inspect and to verify progress towards destruction of the weapon systems.[27] This special commission was to work in coordination with an action team from the International Atomic Energy Agency (IAEA),[28] which would inspect and verify the nuclear capability of the Iraqi infrastructure.[29] Paragraph 8 of Resolution 687 specifically states:

> Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of:
>
> (a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities related thereto;
>
> (b) All ballistic missiles with a range greater than one hundred and fifty kilometers, and related major parts and repair production facilities.[30]

Paragraph 12 goes on to state that Iraq shall unconditionally agree "to place all of its nuclear-weapons-usable materials under the exclusive control, for custody and removal, of the International Atomic Energy Agency,

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25. *See* THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 30. The vote in the Security Council for Resolution 687 was twelve in favor, one against (Cuba), and two abstentions (Ecuador and Yemen). *Id.*

26. *See* S.C. Res. 687, *supra* note 24, at 5-6.

27. *Id.* at 5.

28. Throughout the remainder of this analysis, a reference to UNSCOM will include both the United Nations Special Commission and the International Atomic Energy Agency teams, unless otherwise specified.

29. *See* S.C. Res. 687, *supra* note 24, at 6.

30. *Id.* at 5.

with the assistance and cooperation of the Special Commission."[31] In an exchange of letters, the UNSCOM leadership and the Iraqis established the specific process by which UNSCOM would conduct these inspections. During this exchange, Iraq agreed to "[u]nrestricted freedom of movement without advance notice within Iraq of the personnel of the Special Commission and its equipment and means of transport."[32] For nearly eight years, UNSCOM, to the best of its ability, carried out the requirements under the resolution.

As early as June 1991, Iraq attempted to impede the access of UNSCOM inspections.[33] That month, Iraq sought to deny an IAEA team access to certain locations on three separate occasions.[34] On the third occasion, the IAEA team attempted to block the departure of some vehicles leaving the compound in an effort to inspect the vehicles for illegal material. The Iraqis denied access to the vehicles and fired automatic weapons over the heads of the inspectors to warn them against approaching the vehicles.[35] This was just the beginning of a series of confrontations between UNSCOM and the Iraqi government.

Over the succeeding seven and a half years, the Iraqi government denied UNSCOM inspectors access to suspected weapon sites on innumerable occasions.[36] The Security Council adopted one resolution finding Iraq in material breach of Resolution 687 as it pertains to the inspection and verification of WMD.[37] The Security Council adopted six other resolutions concerning Iraqi violations of Resolution 687, in one case deploring and in the others, condemning the actions of the Iraqi government.[38]

In the fall of 1997, there was a serious confrontation between the international community and Iraq over the continued inspections of

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31. *Id.* at 6.

32. THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 77.

33. *Id.* at 80.

34. *Id.*

35. *Id.*

36. *See* THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 82-94 (finding that between the years 1991 and 1995, Iraq declared ongoing monitoring to be unlawful, threatened UNSCOM aircraft, continued to submit alleged "full and final disclosures" of WMD programs, refused inspection team access to certain sites, blocked UNSCOM flights, attempted to prevent the removal and destruction of chemical agents, protested the installation of monitoring cameras and threatened to block the work of UNSCOM all together).

37. S.C. Res. 707, U.N. SCOR, 46th Sess., at 3, U.N. Doc. S/RES/707 (1991).

UNSCOM within Iraq. Iraq claimed the UNSCOM inspection teams were biased in their composition because the teams included too many westerners and were not representative of the international community.[39] On 29 October 1997, Iraq expelled the American members of the inspection teams.[40] Richard Butler, the head of UNSCOM, removed the remaining teams from Iraq in protest of this American expulsion.[41] The United States made explicit threats to use military action to force Iraqi compliance with Resolution 687.[42] A Russian diplomatic mission managed to extinguish the crisis by coercing Iraq to grant authorization allowing American inspectors to return to Iraq.[43]

Shortly thereafter, another confrontation flared over Iraq's denial of unfettered access to all sites within its territory. In December 1997, Iraq declared certain "presidential palaces" off limits to the UNSCOM inspection teams who sought access to conduct inspections.[44] Although inspections continued at other sites around the country, UNSCOM and the United States suspected Iraq was hiding WMD, and the material to build those weapons, in these presidential palaces. In a statement, Richard Butler explained that it was impossible for UNSCOM to successfully verify full implementation of Resolution 687 without access to these sites and full Iraqi cooperation.[45]

The United States and Great Britain began a military buildup in the region as a means to force strict compliance by Iraq.[46] Several sources

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38. S.C. Res. 1060, U.N. SCOR, 51st Sess., at 2, U.N. Doc. S/RES/1060 (1996); S.C. Res. 1205, U.N. SCOR, 53d Sess., at 2, U.N. Doc. S/RES/11205 (1998); S.C. Res. 1194, U.N. SCOR, 53d Sess., at 2, U.N. Doc. S/RES/1194 (1998); S.C. Res. 1137, U.N. SCOR, 52d Sess., at 2-3, U.N. Doc. S/RES/1137 (1997); S.C. Res. 1134, U.N. SCOR, 52d Sess., at 2, U.N. Doc. S/RES/1134 (1997); S.C. Res. 1115, U.N. SCOR, 52d Sess., at 1, U.N. Doc. S/RES/1115 (1997).

39. *See Iraq Protests U.N. Choices on Arms Team*, N.Y. TIMES, Jan. 12, 1998, at A10 (stating that Iraq criticized the United Nations inspection teams because they had too many American and British experts on them).

40. Steven Lee Myers, *Iraq Carried Out Threat to Expel U.S. Inspectors*, N.Y. TIMES, Nov. 14, 1997, at A1.

41. Steven Lee Myers, *Clinton is Sending 2d Carrier to Gulf*, N.Y. TIMES, Nov. 15, 1997, at A1.

42. *See id.*

43. Steven Erlanger, *Albright Says Iraq Agrees to Let U.S. Inspectors Back*, N.Y. TIMES, Nov. 20, 1997, at A1.

44. Michael R. Gordon & Elaine Sciolino, *The Deal on Iraq: The Way it Happened*, N.Y. TIMES, Feb. 25, 1998, at A1.

45. Christopher S. Wren, *U.N. Official Doubts Team Can Verify Iraq Arms*, N.Y. TIMES, Jan. 24, 1998, at A3 [hereinafter Wren, *U.N. Official Doubts*].

including Russia, France, and the Arab League launched diplomatic efforts.[47] It was not until a personal visit by Kofi Anan, Secretary General of the United Nations, that the international community reached an agreement with Iraq.[48] This agreement required Iraq to comply fully with all United Nations resolutions and thus, provide unfettered access to all suspected weapon sites.[49] Following the agreement, Iraq began to allow United Nations inspectors access to the presidential palaces previously declared off limits.[50] This agreement averted military action by the United States.

On 5 August 1998, the Iraqi government declared that it was ending all cooperation with UNSCOM.[51] Iraq also demanded that the United Nations dismiss Richard Butler as the chief of UNSCOM.[52] This declaration clearly violated the agreement brokered by Kofi Anan earlier in the year. Iraq brought the international community back to the brink of military action.

In the following months, Iraq allowed spot inspections of suspected weapons sites; but, on 31 October 1998, Iraq once again declared an end to cooperation with UNSCOM.[53] After two weeks of negotiations the United States prepared to launch a military strike on Iraq.[54] Once again,

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46. Douglas Jehl, *Standoff with Iraq: The Scene*, N.Y. TIMES, Feb. 5, 1998, at A1.

47. Christopher S. Wren, *The Diplomacy: U.N. Chief Cancels Trip to Mideast as a Hunt for Compromise Continues*, N.Y. TIMES, Feb. 10, 1998, at A8 [hereinafter Wren, *The Diplomacy*].

48. Barbara Crossette, *U.N. Rebuffs U.S. on Threat to Iraq if it Breaks Pact*, N.Y. TIMES, Mar. 3, 1998, at A1 [hereinafter Crossette, *U.N. Rebuffs U.S. on Threat*].

49. *Id.*

50. *Touring Iraq's Presidential Sites*, N.Y. TIMES, Mar. 30, 1998, at A16.

51. Barbara Crossette, *Iraqis Break Off All Cooperation with Inspectors*, N.Y. TIMES, Aug. 5, 1998, at A1 [hereinafter Crossette, *Iraqis Break Off All Cooperation*].

52. *Id.*

53. *See* Barbara Crossette, *In New Challenge to the U.N., Iraq Halts Arms Monitoring*, N.Y. TIMES, Nov. 1, 1998, at 1 (stating that since the announcement in August Iraq allowed spot inspections).

54. *See* Crossette, *As Tension Grows*, *supra* note 5, at A1 (stating that the United States continued to build up forces in the Persian Gulf area in preparation for a possible military strike on Iraq).

Iraq averted a military strike at the last minute by allowing UNSCOM to resume inspections.[55]

On 15 December 1998, Richard Butler provided the Security Council a written report detailing Iraq's level of cooperation with UNSCOM inspections over the course of the previous month.[56] In this report, Richard Butler explained that Iraq had not fully cooperated with the UNSCOM inspection teams.[57] The United States repeated warnings of possible military strikes for Iraq's failure to allow unfettered access to suspected WMD sites and full cooperation with UNSCOM inspection teams.[58]

In response to the report by Richard Butler and the continued noncompliance by Iraq, the United States and Great Britain launched Operation Desert Fox on 16 December 1998.[59] The air campaign consisted of strikes by cruise missiles, fighters, and bombers.[60] The attacks concentrated on command centers, missile factories, and airfields.[61] Out of fear of releasing chemical weapons into the atmosphere and risking collateral damage, the United States and Great Britain did not attack suspected chemical and biological weapon sites.[62]

President Clinton claimed victory at the end of the four-day campaign.[63] Clinton explained that the United States had sought "to degrade Saddam's weapons of mass destruction program" and "his capacity to attack his neighbors."[64] Officials inside the Clinton administration admitted that the effectiveness of an air strike is limited and the damage would

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55. *See* Philip Shenon & Steven Lee Myers, *U.S. Says it was Just Hours Away from Starting Attack Against Iraq*, N.Y. TIMES, Nov. 15, 1998 at 1 (stating that Iraq avoided a military strike because of a last ditch plea by Kofi Anan and Iraq's announcement hours later that the country would allow the inspectors to return to their "normal work").

56. Steven Lee Myers & Barbara Crossette, *Iraq is Accused of New Rebuffs to U.N. Team: U.S. Repeats Warnings of Striking Baghdad*, N.Y. TIMES, Dec. 16, 1998, at A1, A4.

57. *Id.* at A4.

58. *Id.* at A1.

59. Clines & Myers, *supra* note 3, at A1. *See generally UNSCOM: Chronology of Main Events* (visited Feb. 10, 1999) <http://www.un.org/Depts/unscom/chronology.htm>, for a complete timeline of the events surrounding the weapons inspectors leading up to the air strikes.

60. Myers, *U.S. and Britain End Raids*, *supra* note 2, at 20.

61. *Id.*

62. Steven Lee Myers, *Jets Said to Avoid Poison Gas Sites*, N.Y. TIMES, Dec. 18, 1998, at A1 [hereinafter Myers, *Jets Said to Avoid Poison*].

63. Philip Shenon, *Mission Intended to Degrade Iraq Threat*, N.Y. TIMES, Dec. 20, 1998, at 20.

64. *Id.*

merely restrict the Iraqi WMD program for a matter of months or possibly just weeks.[65]

This article analyzes the legality of the military air strikes under international law. By applying the two exceptions of the United Nations Charter and some evolving norms of customary international law, it will become clear that the United States and Great Britain were justified in taking unilateral military action to enforce the provisions of United Nations Resolution 687. This conclusion does not mean that in the future the United States has the authority to act unilaterally, using military force against other nations. Under these particular circumstances, however, the United States action was legally justified.

III. International Law and the Use of Force

To understand the issues, one must first understand the pertinent sources of international law that, according to many scholars, are found in Article 38 of the Statute of the International Court of Justice (ICJ):[66] international conventions, custom, and general principles of law.[67] This article deals primarily with international conventions and customary international law.[68]

In addition, there are two subsidiary sources of international law: judicial decisions and teachings of prominent international legal scholars.[69] There is, however, a caveat contained in Article 59 of the Statute of the ICJ about using a judicial decision as a source of international law.[70] The judicial decisions of the ICJ are not binding, except on the particular dispute for which the decision was made.[71] The practical effect of this

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65. *Id.*

66. ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW & THE USE OF FORCE 5 (1993).

67. Charter of the United Nations Statute and Rules of Court, 1947 I.C.J. Acts & Docs. 46 (ser. D, 2d ed.) No. 1.

68. The general principles of international law are a difficult area because legal scholars can not agree on a sound definition for the terms. AREND & BECK, *supra* note 66, at 7. Principles of international law may mean basic principles recognized in most domestic legal systems, general principles of international law which states have simply come to accept, or principles of higher morality turned into principles of law. *Id.* General principles of law do not play a part in this analysis because the concepts in the discussion do not deal directly with the use of force.

69. Charter of the United Nations Statute and Rules of Court, 1947 I.C.J. Acts & Docs. at 46.

70. *Id.* at 49.

caveat is to prohibit applying *stare decisis* to ICJ decisions.[72] Although an ICJ decision may not be binding outside that particular case, under the principle of *stare decisis*, international legal scholars generally regard ICJ decisions as "persuasive authority of existing international law."[73]

A. International Agreement Law

The first primary source of international law that is important to this discussion is commonly referred to as treaty law. Although the ICJ refers to the first source as international conventions, other terms generally found interchangeable with convention include "treaty, protocol, declaration, covenant, charter, pact, statute, or the word 'agreement' itself."[74] For clarity purposes, this analysis will refer to this source of law as international agreement law, rather than treaty law. The most important international agreement in this dispute is the United Nations Charter.

In 1945, the Allied powers of World War II assembled to draft a charter for the United Nations.[75] On 26 June 1945, fifty-one states signed the Charter and the United Nations was born.[76] Today the membership of the United Nations has expanded to 185 states.[77] The United Nations Charter is an international agreement under international law and is, therefore, binding on all signatories. The heart of the United Nations Charter is Article 2(4), which provides that"[a]ll members shall refrain in their international relations from the threat or use of force against the territorial

71. *Id.*

72. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 107 (2d ed. 1987).

73. *Id.* When the decision of the court is divided and highly political, however, the international legal community is likely to hold the decision in lower regard than a decision that is not political in nature and the deciding votes of the justices are much more lopsided. *Id.* at 108.

74. George K. Walker, *Sources of International Law and the Restatement (Third), Foreign Relations Law of the United States*, 37 NAVAL L. REV. 1, 14 (1988).

75. AREND & BECK, *supra* note 66, at 29.

76. *Id.* at 30.

77. *United Nations Member States* (last modified Dec. 9, 1998) <http://www.un.org/Overview/unmember.html>.

integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations."[78]

This provision, however, was not an absolute ban on the use of force by the international community. Built into the United Nations Charter were two exceptions to this prohibition on the use of force.

The first exception is action by the Security Council under Chapter VII. Article 41 stipulates that the Security Council must first try to use measures short of the use of force to solve problems that pose a threat to international security.[79] Under Article 42, however, "should the Security Council consider that the measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[80]

Resolution 678, allowing the use of "all necessary means" to force an Iraqi withdrawal of Kuwait, is the premiere example of a Chapter VII action by the United Nations.[81] The coalition was justified in using force against Iraq during Desert Storm because the coalition was explicitly authorized to use force by Resolution 678.

The second exception to the use of force in the United Nations Charter is the self-defense provision of Article 51.[82] Under this provision, "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[83]

The limits of this provision have been a topic of debate since 1945 and will be discussed in more detail below. Initially, it is important to understand that there is a legal right to individual or collective self-defense. Beyond Articles 42 and 51, there is no right to the use of force under the United Nations Charter. All of the countries involved in the standoff with

78. U.N. CHARTER art. 2, para. 4.
79. *Id.* art. 41.
80. *Id.* art. 42.
81. *See* S.C. Res. 678, *supra* note 14, at 1.
82. U.N. CHARTER art. 51.
83. *Id.*

Iraq, including Iraq itself, are signatories and therefore, bound by the Charter.

There is disagreement about the exact legal effect of a United Nations resolution.[84] Most of the disagreement revolves around the effect of a General Assembly resolution, rather than a Security Council resolution.[85] The Security Council acts with a certain degree of authority, which the General Assembly does not possess. The Security Council may force member states to comply with matters specifically covered in the United Nations Charter.[86] Article 25 of the United Nations Charter requires member states "to accept and carry out the decisions of the Security Council."[87] Member states are, therefore, obligated to adhere to a resolution passed by the Security Council. Failure to adhere to a Security Council resolution may expose the member state to action by the Security Council following the powers granted to it in Chapter VI and Chapter VII.[88]

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84. JOSEPH MODESTE SWEENEY ET AL., THE INTERNATIONAL LEGAL SYSTEM 2-3 (6th ed. 1988) (finding that there is much controversy surrounding the belief that United Nations resolutions are a source of international law).

85. *Id.* As the Deputy Legal Advisor for the Department of State, Stephen M. Schwebel once stated:

> As a broad statement of U.S. policy in this regard, I think it is fair to state that General Assembly resolutions are regarded as recommendations to member States of the United Nations.
>
> To the extent, which is exceptional, that such resolutions are meant to be declaratory of international law, are adopted with the support of all members, and are observed by the practices of states, such resolutions are evidence of customary international law on a particular subject matter.

Id. (citing MCDOWELL, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1975, at 85 (1976)).

86. Certain Expenses of the United Nations, 1962 I.C.J. 151, 163 (July 1962) (during a discussion about the responsibilities of the Security Council, the court found that Article 24 of the United Nations Charter gives the Security Council the authority "to impose an explicit obligation of compliance" on a member state).

87. U.N. CHARTER art. 25.

88. *See id.* art. 34 (granting the Security Council the power to investigate disputes); *id.* art. 35 (granting the Security Council the power to make recommendations for settlement of a dispute); *id.* art. 41 (granting the Security Council the power to take measures short of armed force); *id.* art. 42 (granting the Security Council the power to use air, sea and land force to maintain or restore international peace and security).

B. Customary International Law

The second source of international law that will play a part in this analysis is customary international law. There are two requirements for an idea to become customary international law: (1) state practice, which is measured by the duration, consistency, and number of states; and (2) a state belief that the practice is legally required, also called *opinio juris*.[89] Without either one of these two requirements, the action does not rise to the level of customary international law. For example, if a state were to refrain from the use of force in a situation only because that state was incapable of taking military action, not because the state believed the action illegal, then the prohibition on the use of force as applied to that state would not rise to level of customary international law.

Although the United Nations Charter is international agreement law, the provisions in the Charter may also become customary international law, if both of the requirements described above are met. This fact is important as the discussion of Operation Desert Fox unfolds.

Through international agreements and customary international law, it is possible to conduct a legal analysis of the standoff between the international community and Iraq. If military action against Iraq violated either of these two sources, then the action would be illegal under international law. This article analyzes three separate and unique theories supporting the validity of the use of force during Operation Desert Fox. The theories are: anticipatory collective self-defense, reprisal, and material breach of Resolution 687. While only one valid theory is necessary to justify military action, this article discusses each theory at length.

IV. Anticipatory Self-Defense

The first theory for legal justification to strike Iraq stems from the notion of self-defense. The international community recognized the theory of self-defense long before adopting the United Nations Charter.[90] Article

89. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

90. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 5, 8, 13, 26, 41 (1963) (tracing the historical development of the use of force from as early as several hundred years before Christ). *But see* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 176 (1994) (claiming that until war was a prohibited action, self-defense was little more than a legal justification to wage war, not a legal right to do so).

51 of the United Nations Charter merely codified the theory and transformed it into an international agreement to which all signatory states must adhere. Self-defense is the theory that a state may respond to force with force.[91]

Over the years, legal scholars have attached several requirements to the use of self-defense. These requirements include necessity, proportionality, and, under certain conditions, imminency.[92] Although the requirements are closely tied together, they are separate. Necessity means that the use of force in self-defense must be absolutely necessary to repel the threat and that "peaceful measures have been found wanting or when they clearly would be futile."[93] Proportionality, on the other hand, prohibits the use of force in self-defense from disproportionately exceeding the manner or the aim of the necessity that originally provoked the use of force.[94] If either of these two requirements are not met, the use of force in self-defense is not legally justified. The third requirement of imminency arises only in the case of anticipatory self-defense and will be explained below.[95]

A. Legal Right to Anticipatory Self-Defense

States have often used the theory of self-defense to strike preemptively against an impending use of force.[96] Anticipatory self-defense is the theory that a state may respond to an imminent threat of force before that force is actually exerted.[97] There is general agreement among international legal scholars that customary international law recognized a right to

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91. *See* BROWNLIE, *supra* note 90, at 252 (defining self-defense as the reaction to an immediate threat posed to the state itself); DINSTEIN, *supra* note 90, at 175 (defining self-defense as the lawful use of force in response to an unlawful use of force or threat of force).

92. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635, 1637 (1984) [hereinafter Schachter, *Right of States*] (stating that self-defense requires necessity and proportionality as well as the additional requirement of imminency when considering the case of anticipatory self-defense). *But see* DINSTEIN, *supra* note 90, at 202-03 (stating that self-defense has the three requirements of necessity, proportionality and immediacy). The distinction between imminency and immediacy is important to the discussion and will be covered in depth in the discussion *infra* Part V.A. Immediacy does not apply effectively in the case of anticipatory self-defense which will be fully explained in this later section.

93. Schachter, *Right of States*, *supra* note 92, at 1635.

94. *Id.* at 1637.

95. *See* discussion *infra* Part IV.A.1.

96. *See* discussion *infra* Part IV.B.

97. BROWNLIE, *supra* note 90, at 257.

anticipatory self-defense before the international community adopted the United Nations Charter.[98]

1. Customary International Law

Anticipatory self-defense became an accepted custom of international law as early as 1837 during the Canadian Rebellion against the British.[99] The *Caroline* case arose from that conflict.[100] During the Canadian Rebellion, the British militia attacked a United States ship, the *Caroline*, which was transporting supplies to Canadian insurgents. This attack led to an agreement between the United States Secretary of State and the British Special Minister to Washington, D.C.[101] In this agreement, the two parties concluded that self-defense may at times require the use of force.[102] For a state to invoke the right of self-defense the state must show that the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[103]

This case defines the right of anticipatory self-defense because it outlines the requirements that a state must meet to act preemptively in self-defense. In the *Caroline* case, the two states concluded that the right to anticipatory self-defense was not properly exercised and the British Special Minister apologized for the intrusion into American territory.[104] Secretary Webster's comment that the threat be instant and overwhelming evolved into the requirement of imminency over the course of time.[105] To

98. *See* AREND & BECK, *supra* note 66, at 72 (citing DINSTEIN, *supra* note 90, at 172); *see also* discussion *infra* Part IV.B; *cf.* BROWNLIE, *supra* note 90, at 257-60 (stating that although most scholars believe customary international law allowed anticipatory self-defense, one must be cautious because certain forms of anticipatory self-defense may exceed the customary international law). Ian Brownlie provides a list of legal scholars who adhere to the belief that anticipatory self-defense is a customary international law. BROWNLIE, *supra* note 90, at 257, n.2.

99. *See* 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* (quoting Letter from Mr. Webster, United States Secretary of State to Lord Ashburton, the British Special Minister to Washington, D.C. (Aug. 6, 1842)).

104. *Id.*

105. *See* Schachter, *Right of States*, *supra* note 92, at 1635 (stating that one may infer from statements given on the debate about the Israeli bombing at Osarik, that a preemptive strike is valid only where the threat is imminent).

justify the preemptive use of force in self-defense, customary international law requires that the threat be imminent.

2. International Agreement Law

Not only may one make the argument that anticipatory self-defense is recognized by customary international law, many scholars would argue that Article 51 of the United Nations Charter authorizes anticipatory self-defense. Analyzing this line of reasoning requires a close look at the exact language in Article 51; however, there have been several disputes as to interpretation of the text.

The first controversy concerning the interpretation centers on the meaning of "inherent right" as it relates to "armed attack" in Article 51.[106] There are two separate schools of thought on whether these phrases would permit anticipatory self-defense.[107] The first is a literal interpretation, in which case there is no right of self-defense without an actual armed attack.[108] Followers of this line of reasoning are sometimes called "restrictionists."[109] Under this interpretation, the supporters argue that "inherent right" in no way modifies "armed attack" and therefore, unless troops, planes or ships cross an international border to commence an attack, there is no right to self-defense. Although this is a plausible interpretation, it

106. *See* U.N. CHARTER art. 51. On 14 December 1974, the General Assembly adopted Resolution 3314, which is the Definition of Aggression. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142-44, U.N. Doc. A/9890 (1974). This resolution was an attempt by the General Assembly to define further an act of aggression as it applies to the United Nations Charter. Unfortunately, there was a caveat put into the definition which severely limits the application of the definition to Article 51. Article 6 of the Definition of Aggression states that "[n]othing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful." *Id.* at 144. Because the use of force in self-defense is a lawful use of force, the prohibition on diminishing the scope of the Charter prevents the Definition of Aggression from diminishing the scope of Article 51.

107. AREND & BECK, *supra* note 66, at 73.

108. *Id.*

109. *Id.* Anthony C. Arend and Robert J. Beck find that Ian Brownlie, Yoram Dinstein, Louis Henkin, and Philip Jessup all fall in the restrictionist category. *Id.* (citing BROWNLIE, *supra* note 90, at 275-78; DINSTEIN, *supra* note 90, at 173; LOUIS HENKIN, HOW NATIONS BEHAVE 140-44 (2d ed. 1979); PHILIP C. JESSUP, A MODERN LAW OF NATIONS 166 (1948)).

completely alters customary international law as it existed at the birth of the United Nations by severely limiting the right to self-defense.

The second school of thought, called "counter-restrictionist," believes that the drafters used "inherent right" in the Article to preserve the right to self-defense as it existed in 1945.[110] The counter-restrictionists would preserve the right of anticipatory self-defense under an alternative interpretation of Article 51.[111] This alternative interpretation concentrates on the word "inherent."[112] To the counter-restrictionist the word modifies self-defense, therefore the drafters did not mean to restrict the customary right of self defense, but rather intended to list one situation under which a nation may resort to self-defense.[113] Some counter-restrictionists further argue that state action since 1945 requires this interpretation because states have on numerous occasions acted under the guise of anticipatory self-defense.[114]

The other Article 51 interpretation problem that may arise in this analysis revolves around the phrase "until the Security Council has taken measures."[115] It is not entirely clear to what extent the Security Council must act in a given situation to preclude a nation from using force in self-defense. One school of thought argues that once the Security Council takes any action whatsoever, that action completely cuts off the continued use of force in self-defense by any nation involved in the conflict.[116] This is a lit-

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110. AREND & BECK, *supra* note 66, at 73. Anthony C. Arend and Robert J. Beck find that D. Bowett, William O'Brien, Myres McDougal, Florentin Feliciano, and Julius Stone all fall into the counter-restrictionist category. *Id.* (citing D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 184-93 (1958) [hereinafter BOWETT, SELF-DEFENCE]; William V. O'Brien, *International Law and the Outbreak of War in the Middle East, 1967*, 11 ORBIS 716, 721 (1967) [hereinafter O'Brien, *International Law*]; MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 232-44 (1961); JULIUS STONE, AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION 98-100 (1958)).

111. AREND & BECK, *supra* note 66, at 73.

112. *Id.*

113. *Id.*

114. *Id.*

115. *See* U.N. CHARTER art. 51.

116. *See* Roger K. Smith, *The Legality of Coercive Arms Control*, 19 YALE J. INT'L L. 455, 496 (1994) (citing comments made in Washington D.C. on 4-6 October 1990 by Professor Abram Chayes at the Conference on International Law and the Non-Use of Force and comments made by United Nations Secretary General Javier Perez de Cuellar as found in *U.N. Article 51 May Not Permit Strike at Iraq*, WASH. POST, Nov. 9, 1990, at A30).

eral interpretation of Article 51 and may lead to some absurd results as described by the opposing school of thought.

The alternative school of thought advances two reasons why this literal interpretation is not valid. First of all, a literal reading of Article 51 would be "an implausible–indeed, absurd–interpretation."[117] Through this interpretation, the right of a state to defend itself would be subordinate to the will of the Security Council.[118] For example, if the Security Council condemned a state claiming to act in self-defense, but failed to take action against the aggressor, a literal interpretation of Article 51 would prevent the injured state from taking any action whatsoever against the aggressor. This simply cannot be the proper interpretation, if the right to self-defense is to be anything other than an illusory right.

The second argument advanced against a literal interpretation is based on the drafters' intent for the United Nations Charter.[119] Initially, there was a proposal to specifically deny the right of a state to act in self-defense, if the Security Council took *any* action.[120] But the drafters rejected this proposal.[121] What this means is that the drafters intended the Article 51 right to self-defense to terminate not upon *any* action by the Security Council, but rather upon *specific* action by the Security Council which *explicitly* denied the right to self-defense.[122]

For these two reasons, by implication, the right to self-defense ends not upon Security Council action per se, but upon Security Council action that *explicitly* eliminates the right to self-defense; or alternatively, determines that the actions of the state acting in self-defense have surpassed the self-defense prerogative and become a threat to international security.[123]

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117. Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 458 (1991) [hereinafter Schachter, *United Nations Law*].

118. Smith, *supra* note 116, at 497.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 497-98.

123. It is this second reason that may prevent a nation from using WMD in self-defense against a conventional attack. The use of WMD would likely exceed the self-defense prerogative and become a threat to international security–although this determination is left up to the Security Council.

In either case, at that point the state acting in self-defense may no longer justify its actions based on Article 51.

There clearly is a right to self-defense under international law recognized by both the United Nations Charter and customary international law. What is not as clear is whether a right to anticipatory self-defense exists. Because of the *Caroline* case, there is a customary international law permitting anticipatory self-defense, but scholars differ dramatically in determining whether that right exists under the United Nations Charter. What does appear clear, however, is that state action since the United Nations Charter was adopted supports the argument that a right to anticipatory self-defense exists.

B. Historical Examples

In the fifty years since the United Nations Charter was adopted, there have been many situations in which states have used force under the rubric of anticipatory self-defense. These actions may shed insight on just how the signatory nations interpret Article 51 and support that customary international law recognizes the right to use force in anticipatory self-defense.

1. Cuban Missile Crisis

The first and possibly most important exercise of anticipatory self-defense was the Cuban Missile Crisis, a confrontation between the United States and the former Soviet Union.[124] On 15 October 1962, the United States discovered that the Soviet Union was shipping nuclear missiles to the island-state of Cuba.[125] The United States initiated a naval blockade of Cuba to prevent further shipments of the weapons to the island.[126]

Under Article 2(4) of the United Nations Charter, this blockade constituted a use of force prohibited by the Charter, although that use of force would be allowed if the action fell under one of the Charter exceptions. In

124. *See* AREND & BECK, *supra* note 66, at 74.

125. A. MARK WEISBURD, USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II, 215 (1997).

126. *Id.* at 216.

the days that followed, the Security Council debated the issue, but never passed a resolution supporting, or condemning the United States action.[127]

The United States officially justified the blockade as a regional action under Article 52 of the United Nations Charter because the Organization of American States endorsed it.[128] But, the question of anticipatory self-defense was intertwined in the discussion.[129] A primary topic in the Security Council discussion was whether the nuclear missiles had a defensive or offensive purpose.[130] If the missiles were on the island for an offensive purpose, then it was possible the United States would have been justified in acting preemptively to strike that offensive capability. The Security Council had several members, including the Soviet Union, voicing strong opposition to the blockade. Because the Security Council did not reach a consensus at least partially suggests that the international community did not completely dismiss the right of anticipatory self-defense.

The Cuban Missile Crisis is an important example for two reasons. First, the situation involved a use of force to prevent proliferating WMD

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127. *Id.* at 217-18.

128. *See* Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 134 (1986) [hereinafter Schachter, *Defense of International Rules*] (stating that the United States viewed the action as a defensive response, however the argument given to the international community was that the Organization of American States was the source of the authority to act). On 23 October 1962, the Organization of American States voted by 19 votes to none to adopt a resolution requesting that Cuba remove the missiles from the island and allowing member states to take all necessary means to achieve this goal. WEISBURD, *supra* note 125, at 216. Article 52 of the United Nations Charter states:

> Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

U.N. CHARTER art. 52.

129. AREND & BECK, *supra* note 66, at 76.

130. For example the Ghanaian delegate to the Security Council, a rotating member, analyzed the situation under the principles of the *Caroline* case. *See id.* at 75. The Ghanaian delegate argued that there was insufficient proof to conclude that the weapons were for offensive purposes and opposed the United States blockade of Cuba because it was an illegal use of force. *See id.* (citing U.N. SCOR, 17th Sess., 1023d mtg. at 19, U.N. Doc. S/PV.1023 (1962) (statement of Quaison-Sackey, Ghanaian delegate to the Security Council)).

and a shift in the balance of power. It is even more important because the support of the United States action came from nations along a large spectrum of ideals and economic development around the globe. In the Security Council, Chile, China, France, Ireland, the United Kingdom, and Venezuela all supported the United States action.[131] On the other hand, the Soviet Union, Ghana, Romania, and the United Arab Republic opposed the United States action.[132] For these reasons, the Cuban Missile Crisis was important in the evolution of anticipatory self-defense.

2. Arab-Israeli War of 1967

Probably the situation that fits the anticipatory self-defense mold best is the 1967 attack by Israel against the Arab states in the region. Although the discussions that followed this attack spent very little time actually addressing anticipatory self-defense, this is predominately a result of the Cold War feuding between the East and West.[133]

After the Soviet Union falsely reported to the United Arab Republic (UAR) that Israel was planning a major attack on the UAR, President Gamal Abdel Nasser took several very provocative actions:[134] the UAR moved a force large enough to conduct offensive operations into the Sinai; Nasser publicly made statements that he intended to eliminate Israel; the UAR dismissed the United Nations emergency force from the Sinai; and the UAR closed the Straits of Tiran to Israel.[135] Israel had previously stated that any interference with Israeli shipping in the Straits of Tiran would constitute an act of war.[136]

On 5 June 1967, Israel mounted a massive air campaign against the UAR airfields.[137] In the days that followed, Israel captured the Sinai, the West Bank, and the Golan Heights in ground maneuvers against the UAR, Jordan, and Syria.[138] On 10 June 1967, both Syria and Israel accepted a cease-fire on the last active front in the short war.[139] Israel justified the

131. WEISBURD, *supra* note 125, at 217.
132. *Id.*
133. AREND & BECK, *supra* note 66, at 77.
134. WEISBURD, *supra* note 125, at 136.
135. *Id.*
136. *Id.*
137. *Id.* at 137.
138. *Id.*
139. *Id.*

attack by arguing that closing the Straits of Tiran was an act of war by the UAR, and the massing of the UAR troops on the southern border of Israel posed a serious and imminent threat to the security of Israel.[140] To prevent an invasion of Israel, the nation struck preemptively against the Arab coalition of the UAR, Jordan, Syria, and Iraq.

In the wake of the Israeli attack, there was debate in both the General Assembly and the Security Council. Most of the sentiment in the Security Council was a result of Cold War animosity.[141] The Soviet Union backed the Arab position finding that the Israeli action was sheer aggression that violated Article 2(4).[142] The United States and the West, however, acquiesced in the Israeli use of force, preferring to focus rather on the Israeli complaints.[143] Because of the posturing on the part of the two superpowers, it is difficult to say whether the use of anticipatory self-defense was a justified use of force in this situation.[144] The failure of the United Nations, however, to condemn the action is an indication that the right to strike preemptively against a possible aggressor was, at a minimum, an unsettled question under the United Nations Charter.

3. Israeli Attack on Iraq

The Israeli Air Force attack against the Iraqi nuclear facility at Osarik was another prominent example of anticipatory self-defense. With the assistance of France and other nations in 1981, Iraq was only three months from completing construction of a nuclear reactor.[145] Although publicly, Iraq claimed the facility was for research only, other factors indicated the

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140. *See* AREND & BECK, *supra* note 66, at 76.

141. *See id.* at 76-77.

142. *See id.*

143. WEISBURD, *supra* note 125, at 139.

> Communist states, Arab states and several prominent nonaligned states tended to condemn Israel unequivocally and demand immediate withdrawal from the territory Israel had taken during the fighting . . . . The second view adhered to by the United States, Canada, Australia, New Zealand, Japan, most Western European states, most Latin American states, and much of Francophone Africa, was that it was necessary to address its causes.

Id. at 138.

144. *See* AREND & BECK, *supra* note 66, at 77.

145. WEISBURD, *supra* note 125, at 287-88.

possible alternative use of manufacturing nuclear weapons for use against Israel.[146] Israel attempted to rally international condemnation and action against the construction of the nuclear reactor in Iraq, but failed in this endeavor.[147] In light of this failure, Israel attacked the facility on 7 June 1981, completely destroying it.[148] The Security Council extensively debated the Israeli attack on the facility. It ultimately adopted a resolution condemning the attack, but the reasons that states supported this resolution were starkly different.[149]

There were many states that argued for a strict restrictionist interpretation of Article 51, condemning the Israeli action as sheer aggression.[150] Although the vast majority of other states also condemned the Israeli action, many of these states argued that, if the action met the requirements of the *Caroline* case, there would have been legal justification under international law for the attack.[151]

This line of reasoning is in accord with a counter-restrictionist view of Article 51.[152] These states found that the problem with the Israeli attack stemmed from the lack of an imminent threat.[153] As required in the *Caroline* case, there must be an instant and overwhelming threat to justify use of force for anticipatory self-defense. The Israeli argument failed because it was not clear whether Iraq would use the reactor to produce nuclear weapons.[154] There was even more doubt about the threat those nuclear weapons would pose to Israel.[155] Even if Iraq intended to use the reactor to produce weapons, there was not an imminent threat of the use of those weapons against Israel.[156] Israel simply argued that Iraq would, in the very

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146. *Id.* at 288. The factors contributing to the Israeli concern included the following: Iraq's uranium purchases that indicated a weapons project rather than peaceful uses for the uranium, IAEA controls on nuclear proliferation were weak, and Iraq officially stated an intention to acquire nuclear weapons to be used against Israel. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. AREND & BECK, *supra* note 66, at 78. The delegates from Syria, Guyanan, Pakistan, Spain, and Yugoslavia took the restrictionist position in expressing an opinion about the Israeli attack. *Id.*

151. *Id.* at 78-79.

152. *Id.* at 78.

153. *Id.* at 78-79. The representatives of Sierra Leone, Great Britain, Uganda, and Niger all argued under a counter-restrictionist approach using the *Caroline* doctrine of an instant and overwhelming force to justify an anticipatory attack. *Id.*

154. *See id.*

155. *See id.*

near future, obtain the *means* to create a weapon, which *could* pose a potential threat to it.[157] The international community simply found this argument too attenuated to support an attack based on anticipatory self-defense.[158]

Although the Security Council passed a resolution condemning the Israeli attack, no sanctions were included in the resolution.[159] This attack is important in the development of the preemptive strike analysis because of the target. Israel feared the future potential use of WMD against the Israeli state. Although it was clear the threat could materialize, the international community overwhelmingly concluded that the threat was too attenuated to support a strike.

These three examples provide the basis for an analysis of the legal justification of a preemptive strike against the WMD facilities in Iraq. There is no clear consensus on whether anticipatory self-defense is an authorized use of force under Article 51. This historical analysis shows that, at a minimum, there is a large block of nations around the globe which support the use of anticipatory self-defense under certain limited conditions. These nations support a counter-restrictionist view of Article 51. This block of nations has grown larger as anticipatory self-defense has increasingly been the basis for a state to use force.[160]

As long as the requirements of necessity, proportionality and imminency are met, these nations would support a preemptive use of force. Because of the state action since the adoption of the United Nations Char-

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156. *Id.* at 79. The British delegate to the Security Council argued extensively under the context of the *Caroline* case finding that there was no instant and overwhelming threat that would authorize a preemptive strike against Iraq. *Id.* The Sierra Leone delegate reached a similar conclusion quoting directly from the *Caroline* case. *Id.*

157. WEISBURD, *supra* note 125, at 289.

158. *See id.* at 288-89. The General Assembly adopted a resolution finding the attack was an act of aggression and seeking an arms embargo as punishment for the attack. *Id.* at 288. The resolution passed by a vote of 109 in favor, 2 against (Israel and the United States) and 34 abstaining (mostly European and Latin American states). *Id.* at 288-89.

159. *Id.* at 288.

160. *See* AREND & BECK, *supra* note 66, at 79 (finding that the base of support for a counter-restrictionist interpretation of Article 51 had increased since the Cuban Missile Crisis). Anthony C. Arend and Robert J. Beck argue that although the international community was divided on the question of the right to use anticipatory self-defense, there is a growing block of nations voicing a counter-restrictionist position. *Id.* This expanding view holds that under certain circumstances anticipatory self-defense may be a justified use of armed force. *Id.* Arend and Beck argue that it is impossible to show a consensus that anticipatory self-defense violates international law. *See id.*

ter, there appears to be a customary right to anticipatory self-defense that prevails today.

C. Threat of Iraqi Weapons of Mass Destruction

Iraq quite clearly possesses the materials and weapons not only to produce WMD, but also the will to use those weapons against other states.[161] Following Resolution 687, the formal cease-fire for the Gulf War, UNSCOM began inspecting Iraqi WMD facilities. During the seven and a half years before Operation Desert Fox, UNSCOM found and destroyed vast amounts of chemical, biological, and nuclear material.[162] Every six months UNSCOM submitted a report to the Security Council on the progress in fulfilling the requirements of Resolution 687.[163] By the beginning of 1998, UNSCOM had destroyed, removed, or rendered useless missiles, missile equipment, chemical weaponry, and biological weaponry, including the entire Al-Hakam facility, the main biological weapons production facility.[164]

This documentation of the UNSCOM progress, even in spite of Iraqi defiance, is a testimony to the success of the weapons inspection program

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161. *See* LEONARD A. COLE, THE ELEVENTH HOUR PLAGUE: THE POLITICS OF BIOLOGICAL AND CHEMICAL WARFARE 87-90 (1997) (Iraq's resolve to use chemical weapons is evident by the use of chemical weapons against Iran in the Iran-Iraq War); William Clinton, Address to the Nation on the Strikes Against Iraq (Dec. 19, 1998), *in* N.Y. TIMES, Dec. 20, 1998, at 20 (President Clinton stating that if Saddam Hussein were left unchecked, he may use WMD against others).

162. *See* THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 95.

163. Since the end of 1995, UNSCOM submitted six reports in accordance with Resolution 687 and the changed reporting procedures outlined in Resolution 1051, which consolidated the reports, required under Resolutions 699 and 715. *See* U.N. SCOR, 53d Sess., U.N. Doc. S/1998/920 (1998) (reporting for the period of 16 April 1998 to 11 October 1998); U.N. SCOR, 53d Sess., U.N. Doc. S/1998/332 (1998) (reporting for the period of 11 October 1997 to 15 April 1998); U.N. SCOR, 52d Sess., U.N. Doc. S/1997/774 (1997) (reporting for the period of 11 April 1997 to 11 October 1997); U.N. SCOR, 52d Sess., U.N. Doc. S/1997/301 (1997) (reporting for the period of 11 October 1996 to 11 April 1997); U.N. SCOR, 51st Sess., U.N. Doc. S/1996/848 (1996) (reporting for the period of 11 April 1996 to 11 October 1996); U.N. SCOR, 51st Sess., U.N. Doc. S/1996/258 (1996) (reporting for the period of 11 October 1995 to 11 April 1996); S.C. Res. 1051, U.N. SCOR, 51st Sess., at 3, U.N. Doc. S/RES/1051 (1996) (requiring a report once every six months from the Special Commission commencing on 11 April 1996); S.C. Res. 699, U.N. SCOR, 46th Sess., at 1, U.N. Doc. S/RES/699 (1991) (requiring a report once every six months from the Special Commission); S.C. Res. 715, U.N. SCOR, 46th Sess., at 2-3, U.N. Doc. S/RES/715 (1991) (requiring a report once every six months from the Special Commission).

established by the Security Council. The extent and history of the WMD program in Iraq is eerie, particularly because of the documented use of

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164. *See UNSCOM Main Achievements* (visited March 1998) <http://www.un.org/Depts/unscom/achievement.htm>. By the beginning of 1998, UNSCOM had destroyed, removed, or rendered useless the following prescribed items:

Missile Area:
- 48 operational long-rage missiles
- 14 conventional missile warheads
- 6 operational mobile launchers
- 28 operational fixed launch pads
- 32 fixed launch pads (under construction)
- 30 missile chemical warheads
- other missile support equipment and materials
- supervision of the destruction of a variety of assembled and non-assembled "super-gun" components

Chemical Area:
- 38,537 filled and empty chemical munitions
- 690 tonnes of chemical weapons agent
- more than 3,000 tonnes of precursors chemicals
- 426 pieces of chemical weapons production equipment
- 91 pieces of related analytical instruments

Biological Area:
- the entire Al-Hakam, the main biological weapons production facility
- a variety of biological weapons production equipment and materials

See UNSCOM Main Achievements (visited March 1998) <http://www.un.org/Depts/unscom/achievement.htm>. The following information may help one further understand the UNSCOM success in the chemical and biological arena. Through the end of 1995, UNSCOM had destroyed the following:

- More than 480,000 litres of chemical warfare agents (including mustard agent and the nerve agents sarin and tabun);
- More than 28,000 filled and nearly 12,000 empty chemical muni tions (involving 8 types of munitions ranging from rockets to artillery shells, bombs and ballistic missile warheads);
- Nearly 1,800,000 litres, more than 1,040,000 kilograms and 648 barrels of some 45 different precursor chemicals for the production of chemical warfare agents;
- Equipment and facilities for chemical weapons production; and
- Biological seed stocks used in Iraq's biological weapons programme.

THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 95.

these weapons in the eight-year war between Iraq and Iran.[165]

1. Chemical Threat

Iraq took an interest in chemical weapons as early as the 1970s.[166] The Iraqi regime was able to begin its chemical weapons production with the help of certain western countries.[167] During the 1980 to 1988 Iran-Iraq War, the Iraqi weapons program grew dramatically.

The war began on 22 September 1980, when Iraqi forces invaded the Iranian territory at Shatt al Arab.[168] The Iraqi attack was in response to an Iranian call for an overthrow of the ruling Ba'ath government in Iraq.[169] Using this as justification, Iraq launched an assault against its menacing neighbor to the east.[170] The initial goal of Iraq was simply to weaken Iran and capture certain territory in the south, which would provide Iraq with a better approach to the Persian Gulf.[171] Both sides made only minor advances into the other's territory during the long eight-year war.[172]

Although the war was a large and protracted struggle between two regional powers, for the most part, the hostilities remained contained to the borders of Iraq and Iran.[173] The significant aspect of the war was Iraq's use of chemical weapons against Iran.[174] Both Iran and Iraq were signatories to the 1925 Geneva Protocol prohibiting the use of chemical and bio-

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165. *See* COLE, *supra* note 161, at 87-88.

166. *Id.* at 81.

167. *Id.* Iraq received components from Switzerland, the Netherlands, Belgium, Italy, and West Germany. *Id.*

168. WEISBURD, *supra* note 125, at 47.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 48.

173. During the Iran-Iraq War, there were limited military clashes over shipping in the Persian Gulf with states not involved in the Iran-Iraq War. *See* discussion *infra* Part V.B.3.

174. COLE, *supra* note 161, at 87-88.

logical weapons in war.[175] But, in contravention of this treaty, Iraq openly and without shame used chemical weapons on the battlefield.[176]

The chemical attacks began as early as 1982 and lasted until the cease-fire in 1988.[177] The attacks included both mustard and nerve agents.[178] Toward the end of the war, Iraq's Foreign Minister Tariq Aziz acknowledged his country's use of chemical weapons, but claimed that Iran used the weapons first.[179] This claim against Iran was never substantiated.[180] There were also claims by Kurdish physicians and Iranian officials that Iraq used biological agents during the war–including botulism and anthrax.[181] These claims were never proven by an outside source.[182]

Since Desert Storm, certain evidence surfaced that raised the possibility that Iraq used chemical weapons during the Gulf War.[183] Again, these claims have not been proven.[184] The Iraqi regime will not hesitate to use chemical and/or biological weapons against another state. The Iraqi chemical threat is well documented and quite clear, but the biological threat is

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175. OFF. OF LEGAL ADVISER, U.S. DEP'T OF STATE, PUB. NO. 9433, TREATIES IN FORCE 369 (1997) (Iran and Iraq are signatories to the agreement, however Iraq placed a reservation on the agreement). *See also* Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

176. *See* COLE, *supra* note 161, at 87-90.

177. *See id.*

178. *Id.* at 88.

179. Serge Schmemann, *Iraq Acknowledges Its Use of Gas but Says Iran Introduced it in War*, N.Y. TIMES, July 2, 1988, at A3. Tariq Aziz said, "Sometimes such [chemical] weapons were used in the bloody war, by both sides." *Id.*

180. COLE, *supra* note 161, at 91-92. Claims were made that Iran used chemical weapons in the town of Halabja against the Kurds, but these claims are only a minority view. *Id.*

181. *Id.* at 93.

182. *Id.* at 92-93.

183. Phillip Shenon, *New Report Cited on Chemical Arms Used in Gulf War*, N.Y. TIMES, Aug. 22, 1996, at A1 [hereinafter Shenon, *New Report Cited*]. The Pentagon acknowledged in a new report that chemical detectors in the forward staging areas of United States forces detected chemicals up to seven times during the first week of the Gulf War. *Id.* The report could not confirm that Iraq actually fired chemical weapons at United States forces, leaving open the possibility that the chemicals were released by facilities in Iraq damaged in the coalition bombing campaign. *Id.*

184. *Id.*

possibly a more serious threat because of the lack of information on the extent of the program.

2. Biological Threat

The consolidated UNSCOM report did not include figures for the Iraqi biological program simply because that program was still a large mystery. It was not until 1995 that the Iraqi regime provided documents attesting to the biological weapons program that the country had pursued since 1973.[185] Iraq claimed these documents were previously unknown to most in the Iraqi regime and were discovered only upon the defection of General Hussein Kamal, the head of the Iraqi Organization of Military Industrialization.[186] This organization was the heart of the Iraqi advanced weapons program, which included its chemical, biological, and nuclear efforts. After General Kamal defected, Iraq released documents admitting that Iraq:

> • Did research on anthrax, botulinum toxin (which cause muscular paralysis resulting in death), aflatoxin (which causes liver cancer), tricothecene mycotoxins (which cause nausea, vomiting and diarrhea), wheat cover smut (which ruins food grains), hemorrhagic conjunctivitis (which causes extreme pain and temporary blindness) and rotavirus (which causes acute diarrhea that can lead to death).
>
> • Field-tested germs in sprayers, 122-millimeter rockets, 155-millimeter artillery shells, tanks dropped from jet fighters and LD-250 aerial bombs.
>
> • Began a crash program to speed germ development in August 1990, just as it invaded Kuwait.
>
> • Built and loaded 25 germ warheads for Al Hussein missiles, which have a range of 400 miles. Botulinum toxin went into 16 of them, anthrax into 5 and aflatoxin into 4. It also filled bombs designated R-400, which hold 20 gallons each. Botulinum toxin went into 100, anthrax into 50 and aflatoxin into 7.

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185. William J. Broad & Judith Miller, *Iraq's Deadliest Arms' Puzzles that Confront Inspectors Breed Fears*, N.Y. TIMES, Feb. 26, 1998, at A1, A10.

186. *Id.*

- Deployed these weapons in the opening days of the 1991 gulf war at four locations ready for use, and kept them there throughout the war.[187]

These documents provided sufficient proof that Iraq maintained a large biological weapons program, which the nation had developed for use against other states. Iraq has since claimed that it destroyed all biological weapons in May and June of 1991, however, inspectors remain skeptical about the truth of this assertion.[188] There is no doubt that Iraq at one time possessed a biological weapons program, and there are many clues which support the claim that Iraq still possess a biological weapons capability.

3. Nuclear Threat

Similar to the biological weapons program, very little is known about the Iraqi nuclear program. It is not entirely clear how close Iraq was to manufacturing a nuclear weapon when the coalition attacked in 1991.[189] Following Resolution 687, the International Atomic Energy Agency (IAEA) teams removed from Iraq's possession plutonium, highly enriched uranium and irradiated uranium.[190] The IAEA teams completed this removal by February 1994, thus eliminating Iraq's nuclear capability to the best of the IAEA's knowledge.[191]

Although UNSCOM and the IAEA have destroyed large amounts of chemical and biological weapons and probably eradicated Iraq's ability to manufacture a nuclear weapon, Iraq still possess the facilities and material to either use or produce WMD. Continued efforts by UNSCOM may some day bring an end to Iraq's ability to manufacture and deploy WMD. How-

187. *Id.*

188. *Id.*

189. *See* HIRO, *supra* note 18, at 251-52 (stating that an IAEA team found in November 1990 that Iraq possessed enough enriched uranium to produce one crude bomb, while the Bush administration claimed that Iraq was approaching its goal of acquiring a nuclear weapons arsenal).

190. THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 95.

191. *Id.*

ever, UNSCOM has not yet reached that point and the threat is still as real as ever.

4. Delivery Capability

The only issue that may diminish the threat of Iraqi's WMD is the delivery capability of these weapons. During the Gulf War, Iraq fired thirty-nine Scud missiles at the state of Israel, all containing conventional warheads.[192] A special technical group, separate from UNSCOM, was sent to Iraq in February 1998 to determine if UNSCOM had eliminated the Iraqi missile capability.[193] The group failed to find that Iraq no longer possessed the long-range missile capability to launch a chemical or biological strike.[194] In spite of the inability to verify the remaining Iraqi missile capability, however, it is believed that Iraq possesses few if any missiles capable of carrying chemical or biological weapons as far as Israel.[195]

Even if Iraq no longer possesses missiles that allow a chemical or biological attack on neighboring states, it is possible that Iraq could use human couriers to move the weapons into population centers and launch an attack on a civilian target. The March 1995 Aum Shinrikyo cult attack on commuters in the Tokyo subway is the perfect example of an unconventional strike using a limited delivery means.[196] This attack used human couriers to release the deadly chemical Sarin into the ventilation system of the subway, leaving ten people dead and thousands injured.[197] The close proximity of Israel and the ability of Iraq to move a weapon through Jordan or Syria makes the possibility of a human courier attack a distinct possibility.

Based on the capability of Iraq and the past record of the Iraqi government using chemical weapons, the threat of a chemical or biological

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192. Joel Greenberg, *Israelis Lining Up for Gas Masks as Officials Warn Iraq*, N.Y. TIMES, Jan. 30, 1998, at A6.

193. Judith Miller, *Standoff with Iraq: The Inspectors*, N.Y. TIMES, Feb. 14, 1998, at A5.

194. *Id.*

195. *See* Michael R. Gordon & Eric Schmitt, *The Plan: U.S. Plan for Iraq Envisions 4 Days of 24-Hour Bombing*, N.Y. TIMES, Feb. 21, 1998, at A1 (stating that American intelligence estimates that Iraq has only a small stockpile of Scud missiles which are capable of carrying biological or chemical warheads and can range as far as Saudi Arabia and Israel).

196. Nicholas D. Kristoff, *Terror in Tokyo: The Overview*, N.Y. TIMES, Mar. 23, 1995, at A1.

197. *Id.*

attack is real. The exact threat is not entirely clear, but one concerned with international peace and security may not dismiss the threat. If UNSCOM or the United States government knew the exact threat posed, the question would be much simpler, but unfortunately, that information is not available to those outside the Iraqi regime. One must assume that there is at least some possibility that Iraq would launch a chemical or biological attack against another state, most likely Israel or the United States. Based on this assumption, this article next analyzes the legal justification for an attack on Iraq's WMD program.

D. Legal Justification Under Anticipatory Self-Defense

Legal justification for a preemptive strike on Iraqi WMD facilities is a difficult case to make. As discussed above, the international community is divided on the legal justification of anticipatory self-defense. There appears, however, to be a growing block of nations who, through rhetoric and through state action, endorse the right to use anticipatory self-defense, if the proper circumstances exist.[198] Necessity, proportionality, and imminency are the three minimum requirements a state would need to meet in order to justify a preemptive strike.

The Security Council adopted Resolution 687 in 1991, and the Iraqi government agreed to adhere to the resolution.[199] For nearly eight years, the international community used the peaceful framework outlined in Resolution 687 to attempt to rid Iraq of its WMD program.

At every turn, the Iraqi regime struggled to conceal weapons and material, as well as inhibit the work of UNSCOM and the IAEA inspection teams.[200] During the crisis in the fall of 1997, the United Nations accepted

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198. *See* AREND & BECK, *supra* note 66, at 79.

199. *See* Letter from the Permanent Representative of Iraq to the President of the Security Council transmitting the National Assembly decision of 6 April 1991 concerning acceptance of Security Council Resolution 687 (Apr. 10, 1991), U.N. SCOR, 46th Sess., U.N. Doc. S/22480 (1991) (formally accepting Resolution 687); Identical Letters from the Deputy Prime Minister and Minister for Foreign Affairs of Iraq to the President of the Security Council and to the Secretary-General stating that Iraq has no choice but to accept the provisions of Security Council Resolution 687 (1991), U.N. SCOR, 46th Sess., U.N. Doc. S/22456 (1991) (making certain condemnations of the resolution as an assault on the sovereignty of Iraq, but stating that Iraq has no choice but to accept the cease-fire resolution).

200. *See* THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 79-94 (detailing a pattern of obstruction and interference with both UNSCOM and IAEA inspectors).

a Russian brokered deal with Iraq to solve the confrontation over weapons inspectors.[201] In early 1998, another major diplomatic effort advanced a peaceful framework to end the standoff and ended in a deal brokered by Kofi Anan.[202] President Clinton called off an air strike at the last minute in November 1998 to give Iraq the opportunity to comply with the inspection agreements.[203]

In light of these attempts by the international community to solve the crisis diplomatically, there can be no doubt that these efforts "have been found wanting."[204] Forceful action became a necessity to end the threat posed by Iraq, thus meeting the first requirement for a legal use of anticipatory self-defense.

In terms of proportionality, Iraq possesses the ability to inflict mass casualties on nations in the region. If deployed and detonated properly, WMD can result in casualties in the thousands, if not millions.[205] The threat is much more serious than any conventional threat a rogue nation could pose to the international community. The problem with WMD is that the weapons will often target both military and non-military population centers. It is difficult, if not impossible, to focus a WMD attack on strictly military targets. That assumes that Iraq would even attempt to target strictly military targets, which is highly unlikely given the Iraqi Scud missile attacks during the Gulf War targeting non-military population centers.[206] Although the threat posed by Iraqi WMD is large scale, which would seem to allow an extensive attack on Iraq, the weapons themselves and the facilities to manufacture and deploy those weapons are limited. Under the rule of proportionality, it would be difficult to justify attacking facilities not associated with the production, deployment, or use of WMD.

During the attack, the United States specifically avoided suspected chemical and biological sites.[207] Instead of attacking the WMD facilities,

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201. Erlanger, *supra* note 43, at A1.

202. Barbara Crossette, *Standoff with Iraq: The Overview; Iraq Agrees to Inspections in a Deal with U.N. Leader*, N.Y. TIMES, Feb. 23, 1998, at A1.

203. *See* Shenon & Myers, *supra* note 55, at 1 (stating that the United States was just hours away from launching air strikes).

204. *See* Schachter, *Right of States*, *supra* note 92, at 1635.

205. *See* Jessica Stern, *Taking the Terror Out of Bioterrorism*, N.Y. TIMES, Apr. 8, 1998, at A19 (claiming that biological weapons are as dangerous as nuclear weapons and could kill millions of people if detonated under the proper circumstances).

206. *See* HIRO, *supra* note 18, at 323 (stating that Iraq hit Tel Aviv and Haifa with twelve Scud missiles during the Gulf War).

207. Myers, *Jets Said to Avoid Poison*, *supra* note 62, at A1.

the United States concentrated the attacks on command centers, missile factories, airfields and large buildings such as Republican Guard barracks.[208] In addition, the United States attacked an oil refinery.[209] The failure to attack the WMD facilities may violate the rule of proportionality. However, some of the targets in the attacks may be sufficiently related to the WMD program to warrant an attack under a proportionality analysis.

Very few targets in the operation fall neatly into an allowed target category or a prohibited target category under the proportionality doctrine. Command centers control the Iraqi military regime–one part of that regime is the WMD program. An attack on the command infrastructure of the Iraqi military and even the civilian government shares a close enough relation to the WMD program to justify an attack under the proportionality doctrine, although that conclusion is certainly open to debate.

Missile factories are clearly an authorized target because the missiles are one of the primary delivery means for WMD. Along the same lines, airfields may also be so closely related to the delivery capability of the WMD that an attack on these targets is justified. However, that justification is much weaker because it is not clear that Iraq has the capability to deliver the WMD by aerial means. It is unlikely the final two targets would qualify under the proportionality doctrine. The Republican Guard barracks and the oil refinery have little, if anything, to do with the use or delivery of a WMD device.

Under the proportionality analysis, the United States finds some success with target selection in the attack. But, it also appears clear that some of the targets would not be proper under the proportionality doctrine. The difficulty with this dilemma is deciding whether the unjustified targets affect the entire operation or merely those specific targets. There is no clear answer for this dilemma; therefore, an assumption that the attack on

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208. Myers, *U.S. and Britain End Raids*, *supra* note 2, at 20; Ross Roberts, *Desert Fox: The Third Night*, PROCEEDINGS (April 1999) <http://www.usni.org/Proceedings/Articles99/PROroberts.htm> (*Proceedings* is a journal published by the U.S. Naval Institute).

209. Myers, *U.S. and Britain End Raids*, *supra* note 2, at 20.

the improper targets does not invalidate the entire operation will allow further analysis under both the self-defense and the reprisal justification.[210]

The final requirement of imminency is another difficult aspect of legal justification for anticipatory self-defense. Iraq poses a threat to international peace and security because it possesses the ability and the will to use WMD. In light of the limited delivery capability of the Iraqi military,[211] however, and the fact that there is no documented proof Iraq used WMD in the Gulf War against the coalition, it is difficult to say that the threat is imminent.[212]

As the *Caroline* case requires, the threat must be instant and overwhelming, neither of which would seem to exist in this situation.[213] The international community failed to recognize a right to anticipatory self-defense in the 1981 Israeli attack on Iraq, the overwhelming reason being Israel's failure to meet the imminency requirement.[214] It is almost certain that the United States would be unable to claim that the threat to its own national security is even close to instant and overwhelming. The best claim would be an instant and overwhelming threat to Israel. If the threat to Israel were found to be imminent, the United States could act in a collective anticipatory self-defense role against Iraq. But, even the threat to Israel is certainly no more imminent than it was in 1981 when the international community condemned the Israeli attack on Iraq. There is simply no instant and overwhelming threat.

Although the United States can make the case under the necessity prong and to some extent under the proportionality prong, it falls short of the mark on the imminency prong. Without meeting these requirements, the United States may not lawfully act in anticipatory self-defense against Iraq. This does not, however, rule out other possible grounds for legally justifying the attack on Iraq.

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210. Because there is a second justification for the material breach of Resolution 687 that does not require a proportionality analysis, the assumption that some invalid targets do not invalidate the entire operation is plausible. *See* discussion *infra* Part VI.

211. *See* Gordon & Schmitt, *supra* note 195, at A1.

212. Shenon, *New Report Cited*, *supra* note 183, at A1.

213. *See* MOORE, *supra* note 99, at 412.

214. *See* WEISBURD, *supra* note 125, at 289.

V. Reprisal

A. Legal Right to Reprisal

The second possible justification for the attack is under the umbrella of reprisal. A reprisal is an action that either punishes a state for past misconduct or deters future misconduct.[215] Under a strict interpretation of Article 2(4), the United Nations Charter prohibits resort to reprisal, but this prohibition is blurred in the face of Article 51 and the practice of states during the existence of the United Nations.

Reprisal, like self-defense, is a self-help remedy in reaction to an unjust action by another state.[216] There are certain preconditions that are common for both self-defense and reprisal.[217] These requirements boil down to necessity and proportionality.[218] The terms have the same definition for reprisal as they have for self-defense.[219]

Imminency has not been applied to reprisal; instead, the requirement of immediacy has been applied.[220] The difference between imminency and immediacy is of prime importance to the analysis of Operation Desert Fox

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215. *See* Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 3 (1972) [hereinafter Bowett, *Reprisals Involving Recourse*] (defining a reprisal as a means to impose punishment for a harm committed or to compel a settlement to a situation created by an illegal action); DINSTEIN, *supra* note 90, at 216 (defining a reprisal as a limited use of force by one state against another for a previous violation of international law).

216. Bowett, *Reprisals Involving Recourse*, *supra* note 215, at 3.

217. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 (1987) (section for unilateral remedies requiring both necessity and proportionality).

218. *Id.*

219. *See* discussion *supra* Part IV.

220. *See* DINSTEIN, *supra* note 90, at 219 (requiring armed reprisals to meet the conditions of necessity, proportionality and immediacy). Professor Dinstein applies the requirement of immediacy to both self-defense and to reprisal. *Id.* at 202, 219. He distinguishes, however, the immediacy requirement for reprisal from that of self-defense by explaining that a temporal element must exist for a reprisal, but plays no part in a self-defense analysis. *See id.* at 220. The requirements of self-defense, particularly anticipatory self-defense, derive from the *Caroline* case. *See* discussion *supra* Part IV.A.1. In the *Caroline* case, anticipatory self-defense requires a threat, which is instant and overwhelming. Although the word instant could imply a temporal relationship, the word overwhelming implies something more in that it requires an event that is going to happen and leaves the target state no opportunity to hesitate in choosing a response. The exact requirements of both anticipatory self-defense and reprisal are far from settled, but this discussion adopts the requirement of imminency for anticipatory self-defense and immediacy for reprisal because of the temporal distinction between the two.

because the justification for the attack based on anticipatory self-defense failed due to the inability to show that the Iraqi threat was imminent. With this in mind, expanding on this difference between imminency and immediacy is required.

Black's Law Dictionary defines immediate as "[p]resent; at once; without delay; not deferred by any interval of time."[221] Imminent on the other hand is defined as "[n]ear at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; . . . something to happen upon the instant."[222] There is a distinct difference between the two terms, however subtle it may seem. The definition of imminent specifically says that the triggering even must be mediate, rather than immediate. Immediacy requires a temporal relationship to the triggering event, while imminency requires the triggering event to be on the verge of happening. This is because mediate requires an intermediary agent, while immediate is an act without the interposition of an intermediary agent.[223]

For anticipatory self-defense that intermediary agent is the impending threat of the use of force. This threat is one that is on the verge of happening, but has not happened yet. Imminent also uses the term instant, as required under the *Caroline* case for a legally justified use of self-defense. Because of this difference between the two terms, there may be cases where a reprisal is justified while a preemptive strike is not or vice versa.

The immediacy requirement means a reprisal must have a temporal relationship to the illegal event, which brought rise to the reprisal.[224] If the illegal event occurred in the distant past, then the immediacy requirement for a reprisal must fail.[225] For one even to consider the legality of a

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221. BLACK'S LAW DICTIONARY 749 (6th ed. 1990).

222. *Id.* at 750.

223. Mediate means "[t]o convey or transmit as an intermediary agent or mechanism." THE AMERICAN HERITAGE DICTIONARY 781 (2d college ed. 1982). Immediate on the other hand means "[a]cting or occurring without the interposition of another agency or object." *Id.* at 643.

224. DINSTEIN, *supra* note 90, at 220. Professor Dinstein applies the theory of immediacy to self-defense as well. *Id.*

225. *Id.*

reprisal, the attack must meet the three conditions of necessity, proportionality, and immediacy.

A reprisal is a punitive measure, unlike self-defense, which is a security measure.[226] Taken in a larger context, by examining a series of confrontations between two states, the distinction between reprisal and self-defense becomes blurred. This distinction is even less clear when the discussion attempts to find the difference between anticipatory self-defense and a reprisal aimed at deterring a future illegal act. The only way to distinguish between the two actions is the difference between an imminent threat and an immediate illegal act.

The United Nations Charter does not directly address the distinction and therefore, leaves the legal justification of reprisal, at least in terms of international agreement law, in a state of limbo. A restrictionist view would strictly prohibit a reprisal. However, a counter-restrictionist interpretation of Article 51 may very well support a claim that Article 51 allows certain armed reprisal.[227] Under this theory, reprisal would be a form of self-defense, differentiated merely by the time and place of the response to the aggressor state's action. On its own, this is a farfetched argument, but in light of state action since adopting the United Nations Charter, this argument garners much more support. A look at state action over the past fifty years is in order.

B. Historical Examples

1. Israeli-Palestinian Conflict

Even if one can draw the line between reprisal and self-defense, the practice of states since the United Nations Charter was adopted would seem to point to the legality of a reprisal under certain conditions. The first and foremost example of reprisal revolves around the protracted conflict between Israel and the Palestinians, particularly from 1971 to 1975.[228] Throughout the conflict, Israel battled its Arab neighbors to protect its ter-

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226. *Id.*

227. *See* William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421, 476 (1990) [hereinafter O'Brien, *Reprisals*] ("[T]he right of self-defense should be interpreted as taking two forms: on-the-spot reaction, and defensive reprisals at a time and a place different from those of the original armed attack.").

228. *See id.* at 426 (finding that the bulk of the Security Council debate concerning reprisal evolved from the Israeli actions during the period 1971 to 1975).

ritorial integrity and maintain its sovereignty. In 1971, the Palestinian guerrillas, fighting against the state of Israel, moved their base of operations into southern Lebanon.[229] For the next four years, the two sides waged a limited war. The war generally consisted of guerrilla warfare, as well as terrorist attacks on Israeli citizens and property.[230] In response, Israel often took military action against Palestinian strongholds on the Israeli borders.[231] This exchange of attacks by the two sides was the norm for the struggle between Israel and the Palestinians.

Israel claimed not that it was involved in acts of reprisal, but rather that Israel was fighting a war against the Palestinians.[232] Israel further explained that these acts were in self-defense against countries that failed to restrain guerrilla activity within their borders. Therefore, the international community must look at the conflict in its entirety, not in the vacuum of separate individual Israeli actions.[233]

The Security Council, on the other hand, referred to the Israeli actions as reprisals and dealt with them as such in its debates on the situation.[234] Taken in the context of the conflict as a whole, it is difficult to dissect and analyze individual actions by either the Israelis or the Palestinians. The general Security Council reaction to the conflict was to condemn Israel for its reprisals against the Palestinians in Lebanon and other states, while failing to condemn or take action against the Palestinian organizations or the countries that harbored them.[235]

From 1970 to 1975 the Security Council adopted eight resolutions that condemned Israel for violating Lebanese territory.[236] The United States vetoed three other resolutions during that period because they were

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229. WEISBURD, *supra* note 125, at 141-42.

230. *See id.* at 142-43.

231. *See id.* at 142.

232. *Id.*

233. O'Brien, *Reprisals*, *supra* note 227, at 434.

234. *Id.* at 436. William V. O'Brien explains that the attitude of the Security Council toward reprisal has been unfair. Certain member states of the Security Council, to include France, the Communist states and Third World states, hold other United Nations member states to a strict interpretation of the United Nations Charter, generally arguing that a reprisal is an illegal use of force. *Id.* at 472-73. Conversely, the actions of national liberation movements, like the Palestine Liberation Organization, are not held to this same strict interpretation. The actions of those national liberation movements are seen as a just war of national liberation. *Id.*

235. Bowett, *Reprisals Involving Recourse*, *supra* note 215, at 24.

236. WEISBURD, *supra* note 125, at 142.

too lopsided against Israel.[237] Other than the verbal condemnation of these eight resolutions, no concrete action was taken by any state against Israel in response to the attacks into southern Lebanon.[238] Although the Security Council may have condemned the actions by the Israelis as an illegal use of force, the failure to act further against the Israeli attacks is evidence of international acceptance that certain types of reprisals are justified. In respect to the law of reprisals, the conflict between Israel and its Arab neighbors is much more extensive than that just described. This brief discussion simply frames the issues and sets the stage for a growing movement in favor of what are known as "reasonable" reprisals.[239]

2. United States' Attack on Libya

During the debates about the Israeli attacks, the United States began to accept and even openly to support the Israeli legal position. This United States policy change culminated with the 1986 raid on Libya.[240] In March of 1986, the United States continued its five-year old policy of asserting its right to navigate on the high seas in the Gulf of Sidra.[241] Libya claimed the Gulf of Sidra was sovereign waters, adopting this view even though the internationally accepted limit of territorial sovereignty was twelve miles offshore.[242]

On 24 March 1986, after being attacked by Libyan shore based missiles, the United States destroyed several missile sites in Libya.[243] In response to the military clashes with Libya, the exercises in the Gulf of Sidra were canceled the next day.[244] On 5 April 1986, however, terrorists bombed a German discotheque killing two Americans.[245] The United

237. *Id.*

238. *Id.* at 143. Only states connected to the Arab states imposed any type of sanction on Israel for these attacks. *Id.*

239. *See* Bowett, *Reprisals Involving Recourse*, *supra* note 215, at 26.

240. *See* Wallace F. Warriner, *The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986*, 37 NAVAL L. REV. 49, 94-95 (1988) (stating that the United States turned to the unilateral use of force as a last resort in combating Libyan terrorism and sent a signal to the international community for a change in the law on the use of force to combat terrorism).

241. *Id.* at 81.

242. U.N. DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, THE LAW OF THE SEA: U.N. CONVENTION ON THE LAW OF SEA at 23, U.N. Sales No. E.97.V.10 (1997).

243. Warriner, *supra* note 240, at 81.

244. *Id.*

245. *Id.* at 82.

States was able to quickly link the attack to Libya and, on 14 April 1986, the United States made limited air strikes on targets in Libya.[246]

The United States claimed that the action was an exercise of its self-defense right under Article 51.[247] The Security Council response was mixed. A resolution to condemn the United States action failed by a vote of nine to five.[248] Although the United States claim was one of self-defense, it fit the reprisal mold much better than it fit the self-defense mold because the attack was in response to a past injustice and a deterrent to future injustices.[249]

Western European nations criticized, but did not go so far as to condemn, the attack.[250] The communist states were critical, but did not take any action against the attack.[251] Most Arab states were very critical, but some Arab states were completely silent on the issue.[252] Arab states chose not to impose a sanction on the United States.[253] The United States action against Libya signaled a growing consensus, particularly among Western states that "reasonable" reprisals are a legal use of force.

3. United States' Attack on Iran

The final significant action in the context of developing the law of reprisal stems from the United States actions in the Persian Gulf from 1987 to 1988. During the war between Iran and Iraq, Iran attacked neutral ships in the Persian Gulf in an attempt to prevent supplies from reaching Iraq. In 1987, the United States began escorting ships in the Persian Gulf, which resulted in several clashes with Iran.[254] These consisted of limited military actions by the Iranians against either neutral ships in the Gulf or direct action against United States military forces in the Gulf.[255] In response, the

246. *Id.* at 83.

247. *Id.* at 86.

248. *Id.* at 87. The United States, Great Britain, France, Australia, and Denmark voted against the resolution. WEISBURD, *supra* note 125, at 296. Venezuela abstained in the vote. *Id.*

249. WEISBURD, *supra* note 125, at 297.

250. *Id.* at 296.

251. *Id.*

252. *Id.* Sudan recalled its ambassador. Tunisia did not comment. Egypt, Iraq, and Jordan voiced only mild criticism. *Id.*

253. *Id.* OPEC would not even consider a sanction against the United States. *Id.*

254. O'Brien, *Reprisals*, *supra* note 227, at 467.

255. *Id.* at 468.

United States attacked several Iranian ships and oil platforms.[256] In 1988 after an acceptance of a cease-fire, the United States stopped escorting ships and the hostilities ended.[257]

In some cases, the United States acted in immediate self-defense against an attack, while in others the United States retaliated for Iranian military action by making limited attacks on oil platforms.[258] The Security Council never debated the United States actions against Iran, including the reprisals against the oil platforms.[259] There are several reasons for this, but this lack of action supports the argument that the Security Council recognizes the right of "reasonable" reprisal under certain circumstances. Even if the right may not be acceptable under a close reading of the United Nations Charter, reprisals may have risen to the level of customary international law.

There are many other instances that could fall under the rubric of reprisal. There are instances where the Security Council acted on and condemned the reprisal, took only limited action against the reprisal, or completely ignored the reprisal. In the past, when it chose to voice an opinion, the Security Council took the firm position that all armed reprisals are illegal.[260] The unclear position, however, derives from the inaction or limited action in certain instances. The growing trend is for either inaction or limited action against a form of "reasonable" reprisal. There may be other explanations for this inaction, such as Cold War animosity, but clearly one possible explanation is the belief that a reprisal is legal under certain conditions.[261]

C. "Reasonableness" Analysis

There has been an attempt to define the criteria by which one may judge the "reasonableness" of state action.[262] The criteria are as follows:

> (1) That the burden of persuasion is upon the government that initiates an official use of force across international boundaries;

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256. *Id.*
257. *Id.*
258. *Id.* at 468-69.
259. *Id.* at 468.
260. Bowett, *Reprisals Involving Recourse*, *supra* note 215, at 21.
261. *Id.* at 22.
262. *See id.* at 27.

(2) That the governmental use of force will demonstrate its defensive character convincingly by connecting the use of force to the protection of territorial integrity, national security, or political independence;

(3) That a genuine and substantial link exists between the prior commission of provocative acts and the resultant claim to be acting in retaliation;

(4) That a diligent effort be made to obtain satisfaction by persuasion and pacific means over a reasonable period of time, including recourse to international organizations;

(5) That the use of force is proportional to the provocation and calculated to avoid its repetition in the future, and that every precaution be taken to avoid excessive damage and unnecessary loss of life, especially with respect to innocent civilians;

(6) That the retaliatory force is directed primarily against military and para-military targets and against military personnel;

(7) That the user of force make a prompt and serious explanation of its conduct before the relevant organ(s) of community review and seek vindication therefrom of its course of action;

(8) That the use of force amounts to a clear message of communication to the target government so that the contours of what constituted the unacceptable provocation are clearly conveyed;

(9) That the user of force cannot achieve its retaliatory purposes by acting within its own territorial domain and thus cannot avoid interference with the sovereign prerogatives of a foreign state;

(10) That the user of force seek a pacific settlement to the underlying dispute on terms that appear to be just and sensitive to the interests of its adversary;

(11) That the pattern of conduct of which the retaliatory use of force is an instance exhibits deference to considerations (1)-(10), and that a disposition to accord respect to the will of the international community be evident;

> (12) That the appraisal of the retaliatory use of force take account of the duration and quality of support, if any, that the target government has given to terroristic enterprises.[263]

This long list of criteria for a "reasonable" reprisal lays out a very specific guideline for this analysis. By meeting at least some of the criteria above, it is arguable that the action could be a "reasonable" reprisal, whereas if the action meets all or nearly all of the criteria it would be difficult to argue the reprisal was not "reasonable."

Allowing for "reasonable" reprisal is one way to deal with the inconsistent positions of the Security Council. Another way is for the Security Council to accept an expansionary view of Article 51.[264] By accepting this expansionary view, certain armed action, before or after the action which prompted the reprisal, could fall into the fold of self-defense. This would turn certain limited reprisals into a subset of self-defense. Either way, it is clear that there is at least mixed feelings about the legality of reprisals. The United States could draw on this lack of unanimity as a basis for justifying the attack on Iraq.

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263. *Id.*

264. *Id.* at 4. Professor Bowett argues that an expansionary view of Article 51 would group together anticipatory self-defense and certain armed reprisals. *Id.* He makes the following argument in support of this claim:

> To take what is now the classic case, let us suppose that guerrilla activity from State *A*'s territory by which State *B*, eventually leads to a military action within State *A*'s territory by which State *B* hopes to destroy the guerrilla bases from which the previous attacks have come and to discourage further attacks. Clearly, this military action cannot strictly be regarded as self-defense in the context of the previous guerrilla activities: they are past, whatever damage has occurred as a result cannot now be prevented and no new military action by State *B* can really be regarded as a defense against attacks in the past. But if one broadens the context and looks at the whole situation between these two states, cannot it be said that the destruction of the guerrilla bases represents a proper, proportionate means of defense-for the security of the state is involved-against future and (given the whole context of past activities) certain attacks.

Id. at 3-4.

D. Legal Justification Under Reprisal

There are two separate lines of reasoning that may support a reprisal justification for Operation Desert Fox. An expansive view of the right to self-defense would quite clearly bring the United States action under the United Nations Charter. Another possibility is a customary right to conduct "reasonable" reprisals. Regardless of which approach is used, the requirements of necessity, proportionality, and immediacy must first be met.

Although the justification is different, the arguments for necessity and proportionality, as addressed above for anticipatory self-defense, would result in the same conclusion when applied to reprisal.[265] Immediacy, on the other hand, is slightly different than imminency. Because immediacy addresses a temporal relationship, it is possible that even though the Iraqi threat is not imminent, it may be immediate.

The current confrontation arose because the international community felt the WMD capability of the Iraqi regime posed a threat to international peace and security.[266] Although UNSCOM and the IAEA have destroyed a portion of the Iraqi WMD arsenal, there is a strong belief that the Iraqi program is far from eradicated.[267] In fact, a recent report hints at the possibility that Iraq may have exported certain parts of its WMD program to friendly countries in the area.[268] If this report is true, the threat of Iraqi WMD looms as large as ever.

The continued Iraqi interference in the UNSCOM investigations makes further discussion of the nature of the threat impossible. Iraq has the capability to use those assets today. It is hard to imagine a chemical or biological threat more immediate than that of Iraq. To fulfill the temporal condition of immediacy, the United States need simply strike Iraq at a point

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265. *See* discussion *supra* Part IV.D.

266. *See Standoff with Iraq; War of Words: The Administration, Its Critics and Questions of Moral Right*, N.Y. TIMES, Feb. 19, 1998, at A9 (presenting excerpts for the answers of Secretary of Defense William Cohen claiming that the United States has a moral obligation to ensure Iraq does not pose a threat to its neighbors).

267. *See* Tim Weiner, *U.N. Inspectors Face a Difficult Task*, N.Y. TIMES, Nov. 22, 1997, at A6 (discussing intelligence reports about the missile, chemical and biological programs believed to still exist in Iraq).

268. *See Other Nations Said to Store Iraq's Arms*, N.Y. TIMES, Feb. 16, 1998, at A8 (Yousef Bodansky, the director of the House of Representatives Task Force on Terrorism and Unconventional Warfare, claims that Iraq maintains a WMD capability through an export of weapons and materials to other countries including Libya, Sudan, and Yemen).

in time in close proximity to the breach of international law which precipitated the reprisal. The threat from Iraq is serious and the breaches common, striking immediately after a breach fulfills the temporal condition of immediacy. In Operation Desert Fox, the United States struck Iraq within twenty-four hours of Richard Butler's report to the Security Council.[269] It is hard to imagine a military action on the scale of Operation Desert Fox, which could be launched in less than twenty-four hours. The reprisal justification meets the immediacy requirement for a use of force.

Based on this minimum requirement analysis, the case for a reprisal under the expansive definition of self-defense is a simple one. If one accepts the expansive view, then as long as the use of force meets the minimum requirements for reprisal, that use of force is justified under the United Nations Charter. The problem here consists of making the leap to accept the expansive view of self-defense, which many are not prepared to make. But, coupled with the support of customary international law, this leap requires a much smaller stretch of the imagination.

For a nation to launch a "reasonable" reprisal, an in-depth analysis of the use of force is required to determine if that action meets the conditions for reasonableness.[270] The best way to achieve this analysis is to address the twelve criteria used to judge reasonableness point by point.

(1) The United States has been extremely vocal and open about making its case for the use of force against Iraq.[271] The United States is not passing the burden of persuasion onto others, but rather accepting that burden as a precursor to the use of force.

(2) Ever since the Gulf War, the United States made it clear to the international community that the United States has a vested national security interest in stability and peace in the Middle East.[272] The vital petroleum resources in the area are extremely

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269. Clines & Myers, *supra* note 3, at A1.

270. *See* Bowett, *Reprisals Involving Recourse*, *supra* note 215, at 26-27.

271. *See* Steven Lee Myers, *Standoff with Iraq: The Allies; Cohen is Heading for Gulf to Tell Arabs of War Plans*, N.Y. TIMES, Feb. 7, 1998, at A6 (describing trips by Secretary of Defense William Cohen and Secretary of State Madeline Albright to the Middle East to explain the United States position and build support for a strike on Iraq).

272. *See Confrontation in the Gulf; Excerpts from President's Remarks to V.F.W. on the Persian Gulf Crisis*, N.Y. TIMES, Aug. 21, 1990, at A12 (citing President George Bush in claiming that the United States deployed military troops to the Middle East in the fall of 1990 to protect American national security, as well as that of the international community).

important to the United States economy.[273] Thus, the use of force is vital to the U.S. national security.

(3) The United States, through the media and contact in the United Nations, has explained to the Iraqi government that violating the Security Council resolutions may result in use of force by the United States.[274] Through this explanation, the United States directly tied any military action to the Iraqi failure to comply with weapons inspections.

(4) The United States went to the brink of military action twice and backed down.[275] The United States used the United Nations and Kofi Anan as pacific means to settle the confrontation to no avail.[276] The President has stayed in close consultation with Security Council members during the entire confrontation.[277] This confrontation is a result of seven and a half years of diplomatic attempts to force Iraqi compliance, which is more than a reasonable amount of time.

(5) The strikes were proportional to the threat to some extent as discussed earlier.[278] The United States used cruise missiles and precision guided bombs as a way to avoid collateral damage.

(6) The strikes concentrated on military targets as evident by the targets listed above.[279]

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273. *See* Michael R. Gordon, *Cracking the Whip*, N.Y. TIMES, Jan. 27, 1991, at 16 (claiming that the Arabian oil fields are the second most important security interest of the United States, directly after the security of Europe).

274. *See* Tim Weiner, *Clinton's Warning to Iraqis: Time for Diplomacy May End*, N.Y. TIMES, Jan. 22, 1998, at A6 (stating that President Clinton, through media sources and through contact with the United Nations, wished to iterate that the window for a diplomatic solution to the crisis with Iraq was closing and military confrontation was a distinct possibility).

275. Crossette, *U.N. Rebuffs U.S. on Threat*, *supra* note 48, at A1; Shenon & Myers, *supra* note 55, at 1.

276. *See* discussion *supra* Part I.

277. *See Standoff with Iraq: War of Words: The Administration, Its Critics and Questions of Moral Right*, N.Y. TIMES, Feb. 19, 1998, at A9 (citing Secretary of State Madeline K. Albright in stating that the United States wants to work closely with the Security Council on the matter and that the United States has support from members of the United Nations); Erlanger, *supra* note 6, at A14 (stating that the United States consulted with sixteen foreign ministers of the Security Council before the attack).

278. *See* discussion *supra* Part IV.D.

279. *See id.*

(7) The air strikes were discussed in the Security Council almost immediately.[280]

(8) Throughout the confrontation the United States explained to the Iraqi government the basis of the unacceptable conduct.[281] Saddam Hussein had the opportunity to avert the air strikes by cooperating with the weapons inspectors.

(9) The United States tried diplomatic channels in February 1998 and November 1998 to no avail.[282] The economic sanctions in place clearly did not force Iraqi cooperation. There was no way for the United States to act forcefully against Iraq from the confines of America.

(10) The strikes were limited to a four-day period at the conclusion of which the United States ceased hostilities on its own accord.[283] The choice to cease the air strikes after a relatively short period of time and the United States attitude toward the Iraqi people showed a sensitivity to Iraqi citizens.[284]

(11) During the February standoff, the United States made efforts to act in accordance with the will of the international community by trying to gather support before possible air strikes.[285] The international community criticized the United States for not seeking this consensus prior to the initiation of hostilities in December 1998.[286] Support during the strikes was not wide spread, but did exist.[287]

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280. *See* Erlanger, *supra* note 6, at A14 (stating that the Security Council met in an emergency meeting on the first day of the air campaign).

281. *See* Clinton, *supra* note 161, at 20 (claiming that the United States made it clear from the beginning that if Iraq did not fully cooperate, the United States would react with military force).

282. Crossette, *U.N. Rebuffs U.S. on Threat*, *supra* note 48, at A1; Shenon & Myers, *supra* note 55, 1.

283. Shenon, *supra* note 63, at 20.

284. *See* Clinton, *supra* note 161, at 20 (stating that the United States would seek to continue the oil for food program even after the completion of the air strikes).

285. *See* Gordon & Sciolino, *supra* note 44, at A1.

286. Erlanger, *supra* note 6, at A25.

287. *See Critics from Paris to Kuwait, but Friend in London*, N.Y. TIMES, Dec. 18, 1998, at A25 (stating that Great Britain, Germany, Spain, Poland and Portugal expressed degrees of approval for the attack, but that some other countries criticized the attack).

(12) President Clinton did not specifically cite Iraq's support for terrorism as a reason behind the attack;[288] however, one month after the attack he described the threat for the twenty-first century.[289] In that description, he specifically mentioned Iraq's WMD capability as a reason to keep a constant vigilance to counter unconditional warfare and bioterrorism around the globe.[290]

For all of these reasons, it should be clear that the United States met most, if not all, the indicators of reasonableness. By meeting these conditions, the strike on Iraq is a "reasonable" reprisal. As such, the attack on the Iraqi WMD fulfills the international requirements to be a customary exercise of international law.

Operation Desert Fox meets the definitional requirements under both an expansive self-defense use of force and a "reasonable" reprisal. Therefore, the action is arguably a valid exercise of the United States right to reprisal in the international arena. "Arguably" is used because many would say that a strict interpretation of the United Nations Charter prevents a reprisal justification for the attack. If the reprisal justification is not enough for the restrictionist camp, one more argument exists for legally justifying an attack on Iraq.

VI. Material Breach of Resolution 687

The final argument that could justify an attack on Iraq derives from the basic legal theory of material breach. This is the justification upon which the United States government appears to rely heavily in explaining the authority for an attack on Iraq.[291] The theory is that Iraq is in material breach of Security Council Resolution 687; therefore, the United States may resort back to Resolution 678 authorizing "all necessary means" in

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288. *See* Clinton, *supra* note 161, at 20 (claiming that the basic assumption in deciding to attack Iraq was based on Saddam Hussein's previous use of WMD).

289. Judith Miller & William J. Broad, *Clinton Describes Terrorism Threat for 21st Century*, N.Y. TIMES, Jan. 22, 1999, at A1, A12.

290. *Id.*

291. *See* Christopher S. Wren, *Standoff with Iraq: The Law; U.N. Resolutions Allow Attack on the Like of Iraq*, N.Y. TIMES, Feb. 5, 1998, at A6 [hereinafter Wren, *Standoff with Iraq*] (concluding that the United States assertion to have a right to attack Iraq stems from a line of reasoning resting on a material breach of Resolution 687, which would return Iraq and the United States to a state of war).

order to force Iraqi compliance with the cease-fire agreement of Resolution 687.

A. Legal Nature of a Security Council Resolution

A better understanding of this line of reasoning requires an in-depth analysis of the legal nature of a United Nations resolution. The Vienna Conventions codified customary international law as it pertains to international agreements.[292] Although an international agreement is the common form of agreement among nations, a United Nations resolution is different in two important ways.[293]

First, an international agreement expresses the will of the agreeing states, whereas a United Nations resolution does not necessarily reflect the will of all member states.[294] It is possible for a resolution to pass in the United Nations without a unanimous vote.[295] There is an even greater distinction when differentiating between a General Assembly resolution and a Security Council resolution. For a General Assembly resolution, all member states have a voice in the debate and an opportunity to vote on the resolution,[296] whereas in the Security Council, only fifteen member states have a voice and a vote.[297] This makes a Security Council resolution even

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292. *See* Vienna Convention on the Law of Treaties (with Annex), *concluded* May 23, 1969, 1155 U.N.T.S. 331; Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *opened for signature* Dec 31, 1986, U.N. Doc. A/CONF.129/15, 25 I.L.M. 543.

293. RENATA SONNENFELD, RESOLUTIONS OF THE UNITED NATIONS SECURITY COUNCIL 1-2 (1988).

294. *Id.* at 1.

295. *See* U.N. CHARTER art. 18 (requiring a two-thirds vote of those members present and voting to pass a resolution); *id.* art. 27 (requiring nine members of the Security Council to vote in favor to pass a resolution and all permanent members must at least concur in the vote).

296. *See* U.N. CHARTER art. 9 (granting each member state a seat in the General Assembly); *id.* art. 18 (granting each member of the General Assembly one vote).

297. *See id.* art. 23 (granting fifteen member states seats on the Security Council, five of which are permanent seats while ten seats rotate every two years); *id.* art. 27 (granting each member of the Security Council one vote for each member state and each permanent member may veto a resolution).

less representative of the will of member states than a General Assembly resolution.

The second way that a United Nations resolution differs from an international agreement is in the adopting body.[298] For an international agreement, it is the agreeing parties that adopt the resolution and is therefore, an agreement between two or more states or organizations.[299] On the other hand, a United Nations resolution is an act of the organization, not an act of the member states.[300] The resolution adopted represents the interest of the United Nations. This interest may or may not be the interest of all member states. These two differences affect the legal nature of a United Nations resolution, but that does not mean that a United Nations resolution is not similar in other ways to an international agreement.

Because a United Nations resolution is not the same as an international agreement, the issue arises as to whether a United Nations resolution is a source of international law. Article 38 of the ICJ Charter does not list a United Nations resolution, per se, as a source of international law.[301] There are three possible explanations for this oversight: United Nations resolutions are not a source of international law different from international agreement law, United Nations resolutions are not legal acts, or the drafters of the ICJ Charter were not aware of this oversight.[302]

The clearest treatment of how a United Nations resolution fits into the international legal framework has been by the ICJ. In the case concerning *Reparations for Injuries Suffered in the Service of the United Nations*, the court essentially established the basis for United Nations resolutions as a source of international law.[303] In the case, the ICJ found that the United Nations is a subject of international law and the organization possesses both international rights and duties.[304]

In another case, the ICJ specifically recognized the acts of an international organization as a source of international law.[305] An advisory opin-

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298. SONNENFELD, *supra* note 293, at 2.

299. *Id.*

300. *Id.*

301. Charter of the United Nations Statute and Rules of Court, 1947 I.C.J. Acts & Docs. 46 (ser. D, 2d ed.) No. 1.

302. SONNENFELD, *supra* note 293, at 3.

303. *See* Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (Apr. 11).

304. *Id.*

ion by the ICJ specifically applied the issue to the Security Council, concluding that Security Council resolutions are binding on member states that must carry out the resolution.[306]

Although the drafters of the United Nations Charter did not explicitly provide an easy answer to this dilemma, it is difficult to believe that the drafters would create an organization without some legally binding authority. Most legal scholars are of the opinion that a United Nations resolution must possess some type of legal character.[307] It appears that the drafters of the ICJ Charter simply did not realize this oversight and therefore, the ICJ Charter failed to include a United Nations resolution as a source of international law.[308]

Assuming that a resolution of the Security Council is a source of international law, the next area of interest is to consider the legal nature of a Security Council resolution. Unlike the previous area, Article 25 of the United Nations Charter answers this question. Member states are required to carry out a Security Council resolution under Article 25.[309] This means that a resolution is binding on member states. Therefore, assuming that a Security Council resolution carries legal authority as a source of international law and member states are bound by the resolution, it logically follows that there must be some method to deal with breach. The remainder of this discussion will rest on the assumption that a Security Council resolution is a source of international law and binds a member state.

B. Material Breach of a Security Council Resolution

The analysis of breach is difficult because the situation with Iraq is unique in that the Security Council has never before adopted a cease-fire

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305. *See* SONNENFELD, *supra* note 291, at 4 (providing an ICJ advisory opinion in the case of the judgments of the International Labour Organization's Administrative Tribunal).

306. Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 54 (June 21).

307. SONNENFELD, *supra* note 293, at 5. But, there are some legal scholars, such as Balladore Pallieri, who do not believe in the full legal effect of resolutions passed by the United Nations. *Id.*

308. There is far less consensus of the status of a General Assembly resolution as a source of international law, however this article does not attempt to draw a conclusion on this issue. The only resolutions pertinent to the crisis with Iraq are Security Council resolutions.

309. *See* U.N. CHARTER art. 25.

resolution as extensive as 687.[310] Unfortunately, nowhere in this resolution is there an explanation of what to do in the event that Iraq may breach the terms of the resolution.[311] The ICJ, however, has ruled on the Security Council authority to act in a similar situation when it reached a decision in the Namibia dispute.[312]

1. The Namibia Case

In 1970, the Security Council adopted Resolution 276, which ordered South Africa to withdraw its administration from Namibia by 4 October 1969.[313] South Africa failed to follow this resolution and withdraw.[314] In addressing the legal consequence of the breach of this resolution, the ICJ first inquired as to the binding nature of the resolution.[315] The court found that "[i]n view of the nature of the powers under Article 25, the question whether [these powers] have been in fact exercised is to be determined in each case."[316]

To make this determination, one must look at: (1) the terms of the resolution, (2) the discussions in the Security Council leading up to the adoption of the resolution, (3) what provisions of the Charter were invoked in the resolution, and (4) all other circumstances which may help the analysis.[317] The court found in the *Namibia* case that Resolution 276 invoked the Article 25 powers and was therefore, binding on all member states.[318] It went further to find that:

> [a] binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such

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310. David M. Morris, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 801, 896 (1996) (stating that the cease-fire terms of Resolution 687 "are entirely unique in U.N. history and world practice").

311. *See* S.C. Res. 687, *supra* note 24.

312. Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 54 (June 21).

313. *Id.* at 51.

314. *Id.* at 54.

315. *Id.* at 53.

316. *Id.*

317. *Id.*

318. *Id.*

> a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end.[319]

In the *Namibia* case, the court also found that it is up to the Security Council to decide what may be done in the event that a state breaches a Security Council resolution.[320] These Security Council decisions include what measures are to be taken and who may take those measures.[321] In the circumstances of the *Namibia* case, the ICJ found that the Security Council was fully authorized to take action against South Africa because of its breach of Resolution 276.[322]

The *Namibia* case is important because it is an extensive discussion of the issues surrounding a breach of a Security Council resolution. Although action may be taken in the event of breach, in the *Namibia* case, that authority would seem to lie with the Security Council alone.[323] The Security Council may delegate the authority to act to member states, but without this explicit grant, the ICJ does not seem to find any authority for member states to act unilaterally. If the *Namibia* analysis is applied directly to the current situation, the United States would be unable to act unilaterally. The case, however, may be significantly distinguished and the application to the current situation limited.

The *Namibia* case may be distinguished because Resolution 678 was in the chain of resolutions leading up to Resolution 687. In fact, Resolution 687 expressly affirmed the application of all thirteen previous resolutions, including Resolution 678.[324] These thirteen resolutions addressed the Iraqi threat to peace and security under the authority granted the Security Council by Article 39 of the United Nations Charter.[325] By so doing,

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319. *Id.* at 54

320. *Id.* at 55.

321. *Id.*

322. *Id.*

323. *See id.*

324. Joseph Murphy, *De Jure War in the Gulf: Lex Specials of Chapter VII Actions Prior to, During, and in the Aftermath of the United Nations War Against Iraq*, 5 N.Y. INT'L L. REV. 71, 82 (1992).

325. *Id.* According to Article 39 of the United Nations Charter the Security Council shall determine whether any threat to the peace, breach of peace or act of aggression has taken place. U.N. CHARTER art. 39. The Security Council may then make a recommendation as to what measures should be taken in accordance with Articles 41 and 42. *Id.*

Resolution 687 implies that Iraq still poses a threat to international peace and security in the region.

The failure of Resolution 687 to replace or revoke Resolution 678 must mean that the authority to use "all necessary means" to restore international peace and security in the region still exists under Resolution 687, modified only by the requirements of Resolution 687 itself.[326] This means that unlike Resolution 276, Resolution 687 was predicated on explicit authority for member states to use force. The *Namibia* case differed as well because Resolution 276 was not a cease-fire resolution, but was rather a resolution seeking South African compliance with norms of international law concerning intervention in another state and apartheid.[327]

In addition, Article 38 and Article 59 of the Statute of the ICJ prevents the *Namibia* decision from binding the international community.[328] Without *stare decisis* the case has no legal impact on future disputes. The case simply provides a scholarly discussion of the issue, which may be applied as the situation allows in the future.

Because the *Namibia* case does not control the current crisis, it is necessary to look elsewhere for authority to act unilaterally in the event of breach. There is no other explicit primary or secondary source of international law that covers the situation, therefore it is necessary to analyze the use of force through analogy and logic. In light of this fact, an analysis of the Iraqi breach requires a two-step process. The first step is to decide if Iraq materially breached the resolution. If no material breach occurred, the analysis must stop there and the United States may not act unilaterally under the theory of material breach. If a material breach did occur, however, the second step is to decide the consequence of that material breach.

2. *Defining Material Breach*

Black's Law Dictionary defines material breach as the "violation of a contract which is substantial and significant and which usually excuses the aggrieved party from further performance under the contract."[329] Although a Security Council resolution differs from an international agree-

326. Murphy, *supra* note 324, at 82.
327. *See* S.C. Res. 276, U.N. SCOR, 25th Sess., U.N. Doc. S/RES/276 (1971).
328. *See* discussion *supra* Part III.
329. BLACK'S LAW DICTIONARY, *supra* note 221, at 189.

ment per se, conceptually speaking similarities exist. The two are similar because both involve consensus between parties on an important international issue. The Vienna Convention defines material breach as: (a) a repudiation of the treaty not sanctioned by the present Convention, or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.[330]

From the dictionary definition and the convention definition, it is possible to define the concept of material breach as it relates to a Security Council resolution. The dictionary definition is broad, whereas the Vienna Convention definition is narrowly tailored for an agreement between states. A material breach of a Security Council resolution could stem from either a repudiation of the resolution by a member state or a violation of an essential element of the resolution. Both of which would be a breach of the resolution. To be material, the breach would have to be both substantial and significant. This application to a Security Council resolution incorporates both definitions into a properly tailored description of material breach.

In 1991, the Security Council found Iraq in material breach of Resolution 687.[331] This material breach was, among other things, a result of Iraq's declaration on 7 July 1991, admitting that the nation maintained three programs to enrich uranium.[332] Iraq argued that the programs were meant for peaceful purposes, but the Security Council found these programs in direct violation of Resolution 687.[333] The Security Council also prohibited Iraq from maintaining any nuclear programs beyond those relating to isotopes for medical, industrial, or agricultural use.[334] Another reason for finding material breach was based on incomplete notification by Iraq to the Security Council as required in Resolution 687 on both 8 April and 28 April 1991.[335] In addition, the Security Council found that Iraq was in material breach for concealing activities from UNSCOM and the IAEA inspectors.[336] Resolution 707 is strong evidence that Iraqi misconduct under the watchful eye of the weapons inspectors may constitute material

330. Vienna Convention Between States and International Organizations, *supra* note 290, art 60, para. 3.

331. S.C. Res. 707, *supra* note 37, at 3.

332. THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 81.

333. *Id.*

334. *Id.*

335. S.C. Res. 707, *supra* note 37, at 3.

336. *Id.*

breach of Resolution 687. No additional resolutions have been adopted that found Iraq in material breach. This may be more for diplomatic reasons on the part of permanent members of the Security Council than because Iraq has not actually been in material breach since the summer of 1991.

Since that time, Iraq has exhibited a pattern of conduct inconsistent with its responsibilities under Resolution 687.[337] In the February 1998 crisis, this conduct resulted in the Iraqi refusal to allow inspectors access to certain suspected weapon sites in Iraq.[338] Because the refusal only applies to a few sites, on its face, this breach would appear to be of little significance, but the truth is quite the contrary. The eight presidential palaces which Iraq restricted access to in February 1998 included approximately 1500 buildings[339]–some of the compounds occupied land area as large as metropolitan Washington, D.C.[340] It would be possible for even the most unsavvy military organization to hide vast amounts of chemical and biological stockpiles in these large establishments.

As part of the original dialogue concerning Resolution 687, Iraq promised the weapons inspectors "[u]nrestricted freedom of movement" within Iraq.[341] It is impossible to match this refusal to allow weapons inspectors into a suspected weapons site with the agreement to allow unrestricted freedom of movement in the country. The two positions are completely inconsistent.

In August 1998 and again in October and November 1998, Iraq declared an end to cooperation with the UNSCOM inspections.[342] Richard

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337. *See supra* note 36.

338. *See* Christopher S. Wren, *'Presidential Sites': How Many, and How Big?*, N.Y. TIMES, Feb. 16, 1998, at A8 [hereinafter Wren, *'Presidential Sites'*] (finding that the core of the showdown with Iraq in the winter of 1997-98 resulted from the closure of certain presidential sites to UNSCOM weapons inspectors).

339. Barbara Crossette, *Standoff with Iraq: In Baghdad; U.N. Team Calls Iraq Sites Smaller then Thought*, N.Y. TIMES, Feb. 21, 1998, at A4 (noting that the figure cited is an estimate by UNSCOM, but the special envoy sent to map the sites found the sites much smaller than UNSCOM described; however this may be explained by the fact that the envoy went off a list provided by Iraqi officials, not one provided by UNSCOM for mapping the sites).

340. Wren, *'Presidential Sites,' supra* note 338, at A8.

341. THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990-1996, *supra* note 8, at 77.

342. Crossette, *Iraqis Break Off All Cooperation*, *supra* note 51, at A1; Crossette, *As Tension Grows*, *supra* note 5, at A1.

Butler's report details the pattern of conduct followed by the Iraqi regime before Operation Desert Fox.[343] Iraq refused to hand over pertinent documents, Iraq claimed that UNSCOM tampering resulted in a positive chemical analysis on missile fragments, and Iraq restricted the access of inspection teams.[344] These among other violations during the seven and a half years of UNSCOM inspections is a clear indication that Iraq failed to live up to the nations responsibilities under Resolution 687.

Material breach requires proof that this refusal violates an essential provision of the agreement because Iraq has not actually repudiated the resolution.[345] Richard Butler released a report in February 1998 in which he expressed his doubts about the ability of UNSCOM to finish its task.[346] In his opinion, if Iraq prevented UNSCOM from answering questions about the WMD in the country, then it is unlikely that UNSCOM can verify the elimination of Iraqi WMD.[347] Richard Butler reiterated this opinion in his report to the Security Council on 15 December 1998.[348]

Quite clearly, a major goal of Resolution 687 is to eliminate the Iraqi WMD program entirely. Although there will continue to be dual use equipment in the country, this equipment will be closely monitored for weapons production, but all other equipment must be destroyed or moved out of the country.[349] If Iraq refuses to allow the inspection of suspected weapons sites and prohibits UNSCOM from verifying the elimination of the WMD program, then the Iraqi actions are a breach of an essential provision of the resolution. This breach is material because it is both substantial and significant.

Without the elimination of the WMD program in Iraq, the intent of Resolution 687 will not be fulfilled and Iraq will remain a threat to international peace and security. There is nothing in Resolution 687, or international law, that would require the finding of material breach to be

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343. Report from Richard Butler, Chief UNSCOM, to Kofi Anan, Secretary General of the U.N. (Dec. 15, 1998), *in* N.Y. TIMES, Dec. 16, 1998, at A4.

344. *Id.*

345. Vienna Convention Between States and International Organizations, *supra* note 292, art. 60, para. 2(c).

346. Wren, *U.N. Official Doubts*, *supra* note 45, at A3.

347. *Id.*

348. Butler, *supra* note 343, at A4.

349. *See* S.C. Res. 687, *supra* note 24, at 5. Dual use equipment is that equipment which possesses both a civilian use and a military use.

documented with a Security Council resolution. There can be little doubt that Iraq has materially breached the resolution on numerous occasions.

3. Consequence of Material Breach

Alternative Theories—Because Iraq materially breached Resolution 687, the next step in the analysis requires a look at the consequence of the material breach. Falling back on the international agreement comparison, the type of international agreement determines what rights a state is entitled to in case of a material breach by another state. In general, a material breach of a multilateral agreement allows for remaining states to decide unanimously to suspend the agreement.[350] If there is not unanimous consent for suspending the agreement, a nation specially affected may suspend the international agreement as it relates to that state, not as it relates to the other states.[351] In essence, international law treats the situation as if there were a bilateral agreement between the states involved in the dispute and, in that case, one party may suspend the agreement in the face of the other party's material breach. What the rule of multilateral treaty suspension prevents is the ability of other states to use a breach against a different state to suspend the agreement without unanimous consent.

In the case of special multilateral treaties, a unanimous decision to suspend the international agreement is not required.[352] For example, in a disarmament agreement, the unanimity requirement would put a nation at risk because the state guilty of breach may be arming for an attack.[353] Disallowing unilateral suspension risks the national security of the state adhering to the agreement. This special provision, however, only applies in cases where the material breach of the international agreement radically alters the situation of every party with respect to furtherance of the goal of the agreement.[354] Unlike domestic contractual breach where material

350. Vienna Convention Between States and International Organizations, *supra* note 292, art. 60, para. 2(a).

351. *Id.* para. 2(b).

352. *Id.* para. 2(c).

353. HENKIN ET AL., *supra* note 72, at 482-83.

354. Vienna Convention Between States and International Organizations, *supra* note 292, art. 60, para. 2(c).

breach may excuse one party in the contract from performance, international agreements allow for excusal only under very limited circumstances.

Resolution 687 would seem to be analogous to a multilateral agreement because it is between the member states of the United Nations and Iraq. The question at that point would be whether it is a special multilateral agreement or a normal multilateral agreement. It would appear to fall into a gray area between a special multilateral agreement, which does not require unanimous consensus for suspension, and a normal multilateral agreement, which does. More than likely, the resolution does not meet the special multilateral agreement requirement that Iraq's actions radically changed the position of the other nations of the world.[355] Iraq's breach, however, certainly affects every state around the globe because the breach raises the risk of a WMD attack. It is difficult to argue that Iraq's material breach altered the position of every state with respect to the obligations under the agreement. Iraq is the state with the obligations, not the other states involved. The worst case scenario is that the agreement is treated as a normal multilateral agreement, in which case the unanimity requirement exists.[356] If this analogy to the international agreement context is accepted, the United States may suspend the operation of the agreement in full or in part as it pertains only to the United States and Iraq. Other states may follow suit, but the suspension is only between that state and the breaching party, Iraq.

Although the analogy to international agreement law may originally appear to assist in the analysis, it must conceptually fail in the end. Nowhere in the United Nations Charter does a state have the right to ignore a Security Council resolution. A Security Council resolution is passed by the collective member states and binds the collective member states. It does not allow a single member state to be excused or ignore the resolution. The domestic breach analogy fails for the exact same reason, one state may not be excused or ignore the resolution. Therefore, using these two theories leads back to square one and leaves unanswered the consequence of breaching a Security Council resolution. There is one last area of international law that may shed some insight on this issue of material breach.

Law of Cessation of Hostilities—Although murky, the law concerning the cessation of hostilities may provide the answer to a breach of a cease-

355. *Id.*
356. *Id.* art. 60, para. 2(a).

fire resolution. Traditionally conflicts ended with an armistice or a peace treaty.[357] The former being a temporary cessation of hostilities, while the latter was a permanent cessation.[358] A peace treaty falls under the purview of the Vienna Convention and one must treat it as an international agreement.[359] On the other hand, an armistice is different and has its own law to govern the temporary cessation of hostilities. Article 40 of the Hague Convention outlined specific provisions in the event one party violated the armistice.[360] Article 40 explained that "[a]ny serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately."[361] Although Article 40 allows for the continuation of hostilities in the event of a violation, the continuation is allowed only under certain circumstances.[362]

The cease-fire concept, on the other hand, is a hodge-podge of all the other methods of ending warfare.[363] Out of the confusion there seems to be some consensus that a cease-fire resolution is a Security Council action that is binding under Chapter VII.[364] The United Nations has traditionally used the cease-fire as a way to end hostilities between belligerents.[365] The cease-fire established by Resolution 687 would seem to fit this mold. Although it may be distinguished from previous cease-fire agreements because, for the first time, it laid the framework by which Iraq could reenter the community of nations.[366]

Legal scholars writing on the topic muddle the exact consequence of a material breach of a Security Council cease-fire resolution. Through a case study approach, a legal scholar concludes that the existence of a United Nations cease-fire limits the authority of the nations involved to resume hostilities in case of a breach.[367] Under this theory, modern inter-

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357. *See* Morris, *supra* note 310, at 809-11 (although he finds that there were four types of cessation of hostilities, he concentrates primarily on the armistice and the peace treaty in his discussion about the evolution of the cease-fire).

358. *Id.* at 810.

359. *See id.* at 810-11 (stating that the peace treaty "is a political act at the heart of sovereign power).

360. Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, With Annex of Regulations, *concluded* Oct. 18, 1907, 36 Stat. 2277, 2305-06.

361. *Id.*

362. *Id.*

363. Morris, *supra* note 310, at 810-11.

364. *Id.* at 813.

365. *Id.* at 802.

366. *Id.* at 892.

national law concerning cease-fires has modified the basic concept developed under armistice law in that, no longer do serious violations amount to a material breach which would allow resumption of hostilities.[368] On the other hand, another legal scholar would disagree with this conclusion, at least as far as it relates to Resolution 687.[369] Since Resolution 687 was the mode by which the international community sought to transform the temporary cease-fire of the Gulf War into a permanent cease-fire, material breach of this agreement nullifies Resolution 687.[370] Nullification would reinstate Resolution 678 and authorize "all means necessary" to return peace and security to the region.[371]

This is the very essence of the United States official position.[372] This theory does place certain restrictions on the use of force in the event hostilities resume.[373] The use of force would have to meet international requirements of necessity and proportionality in order to be a legal use of force.[374] The problem with both theories is that they lack any legal justification beyond mere hypothesis and personal belief. It is not sufficient to accept either analysis on faith alone.

Historical Precedent—The one factor that may tip the scale is the past conduct of the international community. At the end of the Gulf War, the Kurds revolted against the Iraqi regime.[375] Saddam Hussein put down the revolt with military force and began to drive the Kurds north towards Turkey.[376] Turkey feared a large influx of Kurds because it might stir unrest in the southern regions of the country where a large faction of Kurds had been pushing for political independence for quite some time.[377] At the request of Turkey and in response to the Iraqi violation of the cease-fire, certain members of the coalition sent ground troops into northern Iraq to establish safe enclaves for the Kurdish refugees.[378] The countries that par-

367. *Id.* at 822.

368. *Id.*

369. Murphy, *supra* note 324, at 84-85.

370. *Id.* at 85.

371. *Id.*

372. *See* Wren, *Standoff with Iraq*, *supra* note 291, at A6.

373. *Id.*

374. *Id.*

375. Christopher M. Tiso, *Safe Haven Refugee Programs: A Method of Combating International Refugee Crises*, 8 GEO. IMMIGR. L.J. 575, 577 (1994).

376. *Id.*

377. *See id.* at 578 (stating that the Turkish government feared a large influx of Kurds might cause unrest in Turkey).

378. *Id.* at 578.

ticipated in the operation acted without specific Security Council authority, but also without Security Council condemnation.[379] In fact, shortly after the military intervention, the Security Council passed Resolution 688, which required immediate access of humanitarian organizations to the refugees in northern Iraq.[380]

This intervention by the international community was in response to an Iraqi violation of Resolution 686 because Iraq used offensive military force against the Kurds.[381] Had it not been for the cease-fire resolutions, it is highly unlikely the intervention would have happened without sharp criticism. More than likely the intervention would have been condemned as a violation of the national sovereignty of Iraq. This military intervention established a precedent by which states may unilaterally use force to implement the terms of a cease-fire agreement.

In light of this discussion, it is a close call as to whether international law would allow material breach of Resolution 687 to form the basis for unilateral action by the United States. The *Namibia* decision provides important insight into the issues, but that situation may be distinguished from the current situation. Also, the nonbinding nature of an ICJ decision limits the effectiveness of the *Namibia* line of reasoning. Since it is difficult to apply the theory of material breach of an international agreement to the material breach of a Security Council resolution, one must look elsewhere for legal justification. The domestic law theory of material breach would allow the United States to suspend the resolution, but this application is inconsistent with the general concept of a Security Council resolution. Legal scholars differ on the appropriate theory concerning the authority to resume hostilities in the event of a cease-fire violation.

The historical precedent of the coalition intervention in northern Iraq under Resolution 687 is perhaps the one clear factor weighing in favor of allowing unilateral action by the United States and Great Britain. Iraq has materially breached Resolution 687, but the consequence of that material breach is the issue that raises the difficulties faced under this justification for an attack. In light of the historical precedent and the failure of Resolution 687 to repudiate Resolution 678, the United States may justify the

379. *See id.* at 577-78 (finding that the Secretary General was hesitant to get involved in the situation until the coalition operation in northern Iraq forced Iraq to specifically request United Nations assistance).

380. S.C. Res. 688, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/688 (1991).

381. *See* Tiso, *supra* note 373, at 577.

attack on Iraq as a unilateral response to the breach of a Security Council resolution meant to ensure peace and stability in the region.

VII. Conclusion

There is no precise legal authority that would allow the United States to act unilaterally in forcing Iraqi compliance with Resolution 687. Quite clearly, the Security Council would be authorized to force compliance under either Article 41 or Article 42. But the issue is much more difficult when discussing the authority for unilateral action.

Anticipatory self-defense is a generally accepted use of force under the current international-legal framework, although some would argue the United Nations Charter prohibits anticipatory self-defense. In this case, however, Iraq does not pose the imminent threat that must exist for a state to launch a preemptive strike. There is no instant and overwhelming threat to either the United States or Israel that would justify an anticipatory strike against Iraq.

Conversely, the law surrounding reprisal is not clear as to the existence of this right to use force. A strong case may be made, under a counter-restrictionist theory that the United Nations Charter would allow reprisal. An alternative theory, based on customary international law, would allow the use of a "reasonable" reprisal. In either case, as long as the reprisal meets the requirements of necessity, proportionality and immediacy, the use of force may be legally justified. Although the Iraqi threat may not be imminent, it is most certainly immediate. Continued violations of Resolution 687 provide ample opportunity for the United States to meet the temporal requirement of reprisal and strike the Iraqi WMD program. However, the strike must be limited in scope to the WMD threat in order to fulfill the proportionality requirement. Targets struck outside the WMD threat violate the rule of proportionality and would appear to be an unauthorized use of force. These unjustified targets may invalidate the attack were reprisal the only justification; but because material breach is an alternative justification, reprisal against the WMD targets is a valid justification for Operation Desert Fox.

Similar to reprisal, material breach of a Security Council resolution is far from settled law in the international arena. It is easy to show that Iraq materially breached Resolution 687, but it is extremely difficult to determine what the consequence of that material breach should be. The one

clear indicator of international law in the area stems from limited historical precedent. Although contrary opinions exist, the coalition action following the Gulf War and the United Nations acquiescence in that action, indicate that a state may be allowed to act unilaterally in addressing a material breach of a Security Council resolution.

Both before Operation Desert Fox and now only a matter of months after the air strikes, Iraq poses a significant threat to international peace and security. The American and British attack, in accordance with international law, respects the intent of the United Nations Charter by stabilizing international peace and security. It is time the nations of the world took seriously measures passed by the Security Council. Unilateral action by the United States and Great Britain to force compliance with Resolution 687 was a step in that direction. It was an attack intended to stabilize the peace and security of the international community through the limited use of precision attacks against a hostile and dangerous nation.

THE TWELFTH WALDEMAR A. SOLF LECTURE IN INTERNATIONAL LAW[1]

MICHAEL J. MATHESON[2]

I. Introduction

You have heard about Wally Solf's career accomplishments. He was indeed a man of many parts and many achievements. When he was a young man, he was a combat soldier in World War II. He spent many years in the practice of military justice. He was a negotiator in the field of the law of war, and played an important role in the negotiation of the Additional Protocols to the 1949 Geneva Conventions.[3] Later in life, he became a scholar; he organized many important conferences at American University, and was co-author of the definitive treatise on the Additional Protocols.

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1. This article is an edited transcript of a lecture delivered on 28 April 1999 by Michael J. Matheson to members of the staff and faculty, distinguished guests, and officers attending the 47th Graduate Course at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The Waldemar A. Solf Lecture in International Law was established at The Judge Advocate General's School on 8 October 1982. The chair was named after Colonel Waldemar A. Solf, who served in increasingly important positions during his career as a judge advocate. After his retirement, he lectured at American University for two years, then served as Chief of the International Affairs Division, Office of The Judge Advocate General. In that position, he represented the United States at numerous international conferences including those that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful effort in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. He served in that position until his second retirement in August 1979.

2. Mr. Matheson is the Principal Deputy Legal Adviser of the U.S. Department of State. Mr. Matheson has worked as an attorney in the State Department since 1972, and before that in the Department of Defense and in private practice. Among other things, he has represented the U.S. before international tribunals in a number of cases, including the *Yugoslavia*, *Nuclear Weapons*, *Oil Platforms*, and *Lockerbie* cases before the International Court of Justice. He has served as Head of the U.S. Delegation (with the rank of Ambassador) to the United Nations (UN) negotiations on conventional weapons (including land mines and laser weapons). He led the successful efforts to create the International Criminal Tribunals for Rwanda and the former Yugoslavia. He has handled legal work for the Department on a variety of matters involving the use of force, including U.S. involvement in the Iran-Iraq War, the Gulf War, and the Panama, Somalia, Bosnia, and Kosovo situations. The views stated during the lecture were not necessarily those of the Department of State.

3. Protocols Additional to the Geneva Conventions of 12 August 1949, 12 December 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977) [hereinafter Additional Protocol II].

For those of us who had the opportunity to work with Wally, what we remember most is that he was a fine human being. He was a kind, almost grand-fatherly, man. He was a mentor and role model for younger attorneys like myself, and a good friend to all. I am delighted to be able to sit in the Solf Chair this morning and take part in this lecture series. It is a fine way to remember Wally Solf and his contributions to international law.

I have been invited to speak this morning on a topic of my choice. Since we are now coming to the end of the first decade of the post-Cold War world, I thought it might be interesting to look back at the most important developments that have occurred during this period with respect to international law concerning armed conflict. A decade ago, most of us probably thought we were entering a period of relative peace and faithful observance of humanitarian norms. Instead, we have experienced a period of intense violence and incredible atrocities. The international community–and in particular, the international legal structure–has attempted to respond to these events in different ways, some successful and some not. I think it is useful for us to consider these developments and to assess the areas in which significant advances have been made, either in resolving conflicts or at least in building a framework for future action.

I would like to focus on three areas this morning: first, international law concerning the resort to armed force; second, international law relating to the conduct of armed conflict; and third, international law on the consequences of armed conflict, particularly the prosecution of war criminals and compensation for war victims.

II. Resort to Armed Force

During the past decade, there have been several important developments concerning international law on the resort to armed force. First and foremost, the United Nations (UN) Security Council emerged as an effective source of authorization and direction for the use of armed force. Beginning with the Iraqi invasion of Kuwait, and continuing with the situations in Somalia, Bosnia, and Haiti, the Council took a vigorous approach toward the use of armed force to restore and to maintain international peace and security, pursuant to its authority under Chapter VII of the UN Charter. This was, of course, the role intended for the Security Council when the UN system was created, but the Cold War made it impossible to develop consensus among the Permanent Members of the Council, which is a prerequisite for effective action by the Council. However, with the replacement of the Soviet Union on the Council by the Russian Federation,

the Council was again able to act and did so vigorously under U.S. leadership.

Second, in carrying out this new role of peace enforcement, the Council came more and more to turn to states and coalitions of states to carry out the military operations it authorized under Chapter VII. In the Gulf War, and in certain critical phases of the Somalia and Haiti operations, it delegated this responsibility to groups of states led by the United States. In one phase of the Rwanda situation, it authorized French forces to act; and in various phases of the Bosnia conflict, it relied on the North Atlantic Treaty Organization (NATO) forces. This meant that the Council exercised less control over critical phases of these situations. It was obvious, however, that national military forces and command structures were much better able to deal with the task of defeating or deterring hostile armed forces than were traditional UN peacekeeping forces.

Third, during this period the international community showed an increasing willingness to intervene with military forces into internal conflicts and crises. In the cases of Somalia, Rwanda, and Haiti, the Security Council exercised its Chapter VII authority, notwithstanding the internal character of these situations, on the grounds that they threatened the peace and security of their respective regions. In the case of Kosovo, NATO took the further step of armed intervention without Council authorization to deal with an internal humanitarian catastrophe that threatened the security of the Balkan region.

Fourth, during the 1990s, regional organizations played an increasing role in the use of force, either at the invitation of the Security Council or on their own initiative. For example, NATO has been the main international actor in the use of force in Bosnia and again in Kosovo. The Economic Community of West African States has played a similar role in the conflicts in West Africa.

With these four basic developments in mind, I would like now to review the main conflict situations of the post-Cold War period.

A. The Iraqi Invasion of Kuwait

The Iraqi invasion of Kuwait was in many ways the catalyst for these developments. It was an unambiguous case of aggression by an expansionist state against a weak neighbor, accompanied by a serious threat to

the economic and political interests of most of the world, together with a campaign of brutal oppression that violated all recognized humanitarian norms. It was the ideal case for action by the international community.

In fact, the United States and its closest allies could have conducted the entire Gulf War without the authorization of the Security Council, relying entirely on the right of collective self-defense of Kuwait in accordance with Article 51 of the Charter. However, we saw a number of compelling reasons to seek the Council's authorization.

Action by the Council under Chapter VII provided political cover for many states, which might otherwise have been reluctant to participate in a military operation under the effective command of the United States. It gave clear legal and political blessing for a vigorous military campaign that had as its broad dual objectives the expulsion of Iraqi forces from Kuwait and the restoration of the peace and security of the region.[4] It harnessed the authority of the Council to make possible a series of useful multilateral steps in support of the military campaign, such as the trade embargo on Iraq,[5] the air and maritime interdiction of Iraqi commerce,[6] and the opening of access to the airspace and waters of all states for use by coalition forces.[7] For these and other reasons, the United States sought Security Council action at every phase of Operations Desert Shield and Desert Storm, and benefited greatly from the Council's consistent support.

At the close of military operations, we again found valuable use of the Council's broad Chapter VII authority. The Council's resolutions–and particularly Resolution 687, the "mother of all resolutions"–established, with binding legal force, the terms of the cease-fire and the requirements with which Iraq would have to comply to qualify for the lifting of sanctions. (This in turn provided a legal basis for further military action in the event of Iraqi non-compliance.)

Further, the Council's resolutions established several regimes that were essential to maintaining peace and security in the region. One was the authoritative delimitation of the Iraq-Kuwait boundary (one of the ostensible causes of the War), together with a demilitarized zone and a UN

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4. *See* S.C. Res. 678, U.N. SCOR (1990), para. 2. All U.N. Security Council Resolutions can be found on the Internet at <http://www.un.org/Docs/scres>.

5. S.C. Res. 661, U.N. SCOR (1990).

6. *See* S.C. Res. 665, U.N. SCOR (1990); S.C. Res. 670, U.N. SCOR (1990).

7. S.C. Res. 665, U.N. SCOR (1990), para. 3; S.C. Res. 678, U.N. SCOR (1990), para. 3.

force to patrol it.[8] A second was imposing obligations on Iraq to eliminate its weapons of mass destruction and their delivery systems, together with another UN force to monitor and to facilitate compliance with it.[9] A third was the creation of an extensive operation to collect Iraqi oil revenues and apply them for the benefit of those suffering injury or loss because of the War.[10]

Together, the actions of the Council from the beginning to the end of the Gulf War were by far the most ambitious and comprehensive use by the Council of its Chapter VII authority. It was not self-evident that the Council's authority carried so far, and considerable persuasive effort was needed to convince Members of the Council that these steps were within its authority and were justified under the circumstances. They are, however, an impressive precedent and demonstration of what the Council can do when it has the political will to do so.

B. Iraq after Desert Storm

Unfortunately, the Gulf War cease-fire did not end the problems with Iraq. From time to time, over the rest of the decade, it has been necessary for coalition states to use military force in Iraq to enforce the cease-fire and to keep the peace. This use of force has included creating and enforcing no-fly and no-drive zones, air strikes against Iraqi targets, and the brief deployment of forces into northern Iraq after the end of the Gulf War.

From a legal viewpoint, these deployments fall into three categories. First, were the actions taken by coalition forces in response to Iraqi violations of the terms of the cease-fire established by the Council? These violations included denial of access to UN inspection personnel, retention of weapons of mass destruction or their delivery systems, and violations of the border or the demilitarized zone. On a number of occasions, the Council formally determined that such violations constituted material breaches of the terms of the cease-fire,[11] with the unstated understanding that this would justify proportionate armed action by coalition forces to cause Iraq to halt or reverse its violations.

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8. S.C. Res. 687, U.N. SCOR (1991), para. 2-6.
9. *Id.* para. 7-14.
10. *Id.* para. 16-19.
11. *See, e.g.*, S.C. Res. 707, U.N. SCOR (1991).

On other occasions, the Council was not in a position to make such a determination because of internal disagreements; but in such cases, the United States took the position that proportionate armed action was still justified and acted accordingly. Our view was that there was no need for the Council to make such a determination in each case; if a material breach had occurred, the right to take armed action still applied. It has generally been accepted that a state that is party to a cease-fire arrangement has the right to use proportionate force to compel another party to the cease-fire to stop the material breaches of its terms. There was no reason for a different result here.

The second category of armed actions against Iraq resulted from Iraq's violating Security Council Resolution 688, which found that Iraq's oppression of minority groups in its population–specifically, the Kurds in the north and the Shia in the south–constituted a threat to the peace and security of the region. The resolution directed Iraq to halt such actions. This resolution did not expressly authorize the coalition to use force to compel Iraq to halt. Thus, there was some difference of view as to whether such force was lawful, and if so, on what basis. Some took the view that forcible intervention would be justified by the doctrine of humanitarian intervention. The United States, which had not accepted that doctrine, based its actions on authority implied from the decisions of the Security Council–a combination of Resolution 688 and previous resolutions that had authorized the use of force to restore peace and security to the region.[12]

The third category of armed actions were those justified by self-defense. Many air strikes were–and still are–justified by the need to protect coalition aircraft from attack by Iraqi air defenses. On another occasion, U.S. forces struck Iraqi targets as a self-defense response to the Iraqi attempt to assassinate former President Bush. Further, the no-fly zones have been justified in part as measures necessary to protect other coalition aircraft or–in the case of northern Iraq–international personnel on the ground.

Differences continue as to whether coalition states may lawfully use force against Iraq without express Security Council authorization. These differences focus largely on the question of whether and when states may imply a right to use force from a previous determination by the Council that certain actions would constitute a threat to peace and security. With

12. *See* S.C. Res. 678, U.N. SCOR (1990), para. 2; S.C. Res. 687, U.N. SCOR (1991), para. 1.

the increasing differences that we see among Council members, this question continues to be an important one.

C. Bosnia

The next major international conflict of the decade was in the former Yugoslavia, particularly Bosnia. As political authority broke down and armed conflict erupted, the Security Council began by exercising its authority in the traditional way. It created a UN peacekeeping force.[13] It gave that force various functions of a non-combat character to protect civilians, to reopen the Sarajevo airport, and the like.[14] But these measures proved inadequate, and the Council began to exercise its authority under Chapter VII by authorizing states and organizations of states to use force when necessary. In particular, it authorized states to use force to halt and inspect maritime shipping as a means of enforcing the arms embargo,[15] to protect the safe areas,[16] and finally to enforce the Dayton Agreements.[17]

You may recall that the Dayton Agreements included a remarkable grant of authority to a multinational force (essentially consisting of NATO elements). This force had the authority to use armed force at any time when necessary to enforce the agreement, to control and disarm local military and paramilitary forces, and generally to keep the peace. This arrangement had the dual legal authorization of consent by the states and factions involved in the fighting, and the authorization of the Security Council under Chapter VII.

D. Internal Conflicts

We then saw a series of conflicts that were essentially internal in character, but were regarded by the Security Council as such a threat to peace and security that they warranted armed action. In each case, the United States took the view that the Council had the authority under Chapter VII to make such a determination, notwithstanding the internal nature of the situation. In each case, the Council was persuaded that this was correct, notwithstanding the doubts or reservations of some members.

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13. S.C. Res. 743, U.N. SCOR (1993).
14. *See, e.g.*, S.C. Res. 776, U.N. SCOR (1993); S.C. Res. 758, U.N. SCOR (1993).
15. S.C. Res. 787, U.N. SCOR (1992), para. 12.
16. S.C. Res. 836, U.N. SCOR (1994), para. 10.
17. S.C. Res. 1031, U.N. SCOR (1995), para. 15.

The first of these situations was in Somalia, where a traditional UN peacekeeping force was present at the time of the total breakdown of political authority and the threat of a severe humanitarian catastrophe. By the end of 1992, it was obvious that this UN force was totally unable to cope with the situation. The United States offered to send 20,000 troops. The Council accepted the offer, and authorized the use of all necessary means to restore order and deal with the humanitarian situation.[18] This part of the Somalia operation was successful, but at a later point, when the mission had been returned to a traditional UN peacekeeping force, the situation deteriorated badly and UN forces were withdrawn.

The next of these internal conflicts was in Rwanda. When severe genocidal violence broke out in 1994, a small UN peacekeeping force of the traditional kind was present, but was unable to cope with the situation. This time, France offered to intervene with national forces to establish a protected zone to shelter civilians in that area. The Council authorized France to use all necessary means to take these steps.[19] While the French intervention was temporary and limited in scope, it did save a considerable number of lives.

The third internal situation was in Haiti. The breakdown of democratic government and serious human rights abuses had caused heavy refugee flows into neighboring countries and threatened other destabilizing effects in the region. The Security Council responded at first with partial measures, including an economic embargo.[20] In the end, however, the Council was compelled to authorize the use of force by a multinational coalition of states under the leadership of the United States,[21] which restored the elected government and carried out other actions to relieve the humanitarian situation.

The last of this series of interventions into internal situations was in Kosovo. Here, because of fundamental differences among the Permanent Members, the Security Council was unable to authorize the forcible intervention that was necessary to deal with a serious humanitarian catastrophe for the Albanian population of Kosovo. The Council did a number of important things, including the finding that the actions of the Milosevic regime were a threat to peace and security and a direction to the Federal

18. S.C. Res. 794, U.N. SCOR (1992), para. 10.
19. S.C. Res. 929, U.N. SCOR (1994), para. 3.
20. S.C. Res. 841, U.N. SCOR (1993).
21. S.C. Res. 940, U.N. SCOR (1994), para. 4.

Republic of Yugoslavia (FRY) to take steps to halt its repression of Kosovar Albanians.[22] But, the Council was unable to adopt an express authorization for the use of force to implement its directions.

Nonetheless, NATO found it essential to act. In justifying its use of force on its own authority, NATO pointed to various factors. These included the severe humanitarian catastrophe caused by Serb conduct, the threat to the stability and security of other states in the region, the actions taken by the Security Council, the special role of NATO as a regional organization in securing the peace in Europe, the extensive violations by the FRY of its past commitments, and the extensive violations of international humanitarian law. These factors taken together justified armed intervention in these unique circumstances. Although some individual NATO members adopted new doctrine, such as the doctrine of humanitarian intervention, NATO as a whole did not do so.

In some ways, we have now come full-circle to a situation that bears some resemblance to that which prevailed at the end of the Cold War. Specifically, the Permanent Members of the Security Council have serious differences about the situations under which a resort to armed force is lawful and appropriate. In the Kosovo situation, these differences have prevented the Council from taking action that has proved necessary to deal with the situation. Whether these differences will prove to be an ongoing impediment to effective action by the Council remains to be seen.

III. Conduct of Armed Conflict

I now turn to the second area I would like to cover today: conduct of armed conflict. There have been important developments in this post-Cold War decade concerning the international rules that govern the conduct of armed conflict, particularly with regard to the protection of the civilian population.

A. Landmines

First, the threat to the civilian population that was perceived by the international community to be the most severe was that posed by the indiscriminate use of anti-personnel landmines. During the armed conflicts of

22. *See, e.g.*, S.C. Res. 1199, U.N. SCOR (1998).

the 1980s, it was obvious that civilians were at tremendous risk, particularly in rural areas in Third World countries. In many of these conflicts, landmines were used as a means of terrorizing civilians or compelling them to leave certain areas. Such practices caused severe casualties among non-combatants and seriously disrupted normal life and economic survival in many communities.

In 1980, an international agreement had been adopted to regulate the use of mines and booby-traps.[23] But, it became clear that this agreement was inadequate, particularly in that it had no real effect on long-lived anti-personnel mines that could cause casualties for decades. Thus, negotiations were resumed in the 1990s to produce a more effective regime.

When the State and Defense Departments considered what position the United States should take in these negotiations, we realized that the U.S. military had, for military reasons, already adopted a number of limitations on the design and use of mines that would provide important protection for civilians. Specifically, U.S. landmines are detectable by standard mine-detection equipment, and all U.S. anti-personnel mines are either kept within marked and monitored fields or are equipped with self-destruct devices that ensure that the mine will be rendered harmless after a very brief period and with very high reliability.

Our mines have been configured in this way for good military reasons. United States forces intend to take the offensive in any conflict and to make both offensive and defensive use of landmines. In such circumstances, military commanders obviously want to avoid casualties to advancing friendly forces that would result from the presence of mines on the battlefield that cannot be readily detected or that remain active after their mission has been served. At the same time, we realized that these characteristics would significantly reduce civilian casualties: detectable landmines can be found and cleared, and reliable self-destructing mines would not present a continuing risk to civilians long after the conflict had ended.

Therefore, the United States proposed that these requirements be the core of the revision of the Mines Protocol. At first, other states were skep-

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23. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, 19 I.L.M. 1529. This Protocol is also known as Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to Be Excessively Injurious or to have Indiscriminate Effects.

tical. They feared that the United States was simply trying to perpetuate its technological superiority by banning simpler mine designs, or to create new markets for its own products. However, we were able to convince these states that our proposals would meet their legitimate military requirements without a great deal of technical sophistication. The most difficult task was to convince China, Russia, and India–each of which had large stockpiles of non-compliant mines–that the military and economic burden of converting their inventories was not unduly burdensome, in light of the humanitarian and political advantages of accepting our proposals.

The result, after a considerable expenditure of time and effort, was general agreement on an Amended Mines Protocol[24] based on the U.S. proposals. Under that Amended Protocol, all anti-personnel mines must be detectable. All remotely-delivered anti-personnel mines (those delivered by aircraft or artillery) must have self-destruct devices and backup self-deactivation features that render the mine harmless within a very brief period and with very high reliability.[25] All hand-emplaced anti-personnel mines either must have such self-destruct devices, or be kept within marked and monitored fields to keep civilians out of danger.[26] In addition, states that emplace mines must assume responsibility for their clearance or maintenance within the new Protocol standards.[27] Thus far, the United States, China, and Pakistan have ratified the Amended Protocol (along with most of our NATO allies); and we are encouraging Russia and India to do likewise.

Since the conclusion of the Amended Mines Protocol, there has been a movement to ban anti-personnel mines altogether, which culminated in the conclusion of the Ottawa Convention.[28] A large number of states have signed this Convention, but not the major landmine users, such as Russia, China, and India. The United States was not able to subscribe to the Ottawa Convention, partly because it continues to have a requirement for landmines in Korea, and partly because it has a general continuing requirement for the use of anti-personnel devices to protect our anti-tank mines

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24. Protocol on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), *amended* May 3, 1996, art. 2, U.S. TREATY DOC. NO. 105-1, at 37, 35 I.L.M. 1206 [hereinafter Amended Protocol II].

25. *Id.* art. 6.

26. *Id.* art. 5.

27. *Id.* arts. 3(2), 10.

28. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, art. 2, *opened for signature* Sept. 18, 1997, 36 I.L.M. 1507.

from interference by enemy personnel. The Department of Defense is looking for alternatives to these systems to perform the same military function, but we do not yet know whether that will be possible.

Quite apart from the U.S. situation, the other major landmine users, such as Russia, India, and China, are not going to ratify the Ottawa Treaty in the foreseeable future. Therefore, it continues to be essential, notwithstanding the Ottawa Treaty, to have an alternative regime to impose reasonable restrictions, consistent with legitimate military requirements, that offer real humanitarian protection against the devastating consequences that the improper use of landmines can have on the civilian population. That alternative regime is the Amended Mines Protocol.

B. Internal Armed Conflicts

The second issue for the law of armed conflict during this decade has been the question of the applicability of the rules of international humanitarian law to internal armed conflicts. It has been clear from the experience of the past few decades that it is internal conflicts rather than international conflicts that have posed the most serious danger to the civilian population and the highest incidence of atrocities.

As you know, there are instruments of international law that apply to internal conflicts, but they tend to be limited in scope. Article 3 common to the four 1949 Geneva Conventions[29] does cover all internal armed conflicts, but provides only certain basic–albeit very important–humanitarian protections. Additional Protocol II[30] to the Geneva Conventions is more expansive in substance, but is limited in scope. It covers only those internal conflicts which involve an insurgent group that is under responsible command and exerts such control over national territory as to be able to carry out regular military operations. You can see from this definition that many guerrilla wars would be excluded from Additional Protocol II.

Why do these limitations exist? Primarily, limits exist because of objections raised by the non-aligned countries, and by former Soviet bloc states, that applying international rules to internal groups would enhance the status of those groups; because it was unrealistic to expect groups of

29. Geneva Conventions for the Protection of 12 August 1949, 75 U.N.T.S. 3, 116 I.L.M. 1391 (1977).

30. *See* Additional Protocol II, *supra* note 3.

this kind to comply with such rules, which would put their national forces at a disadvantage; and because such rules could give outside powers an excuse for armed intervention for the ostensible purpose of enforcing them.

In the case of the Amended Mines Protocol, the United States fought this issue for a considerable period before it was able to convince China, India, and others to accept that the Protocol should apply to internal as well as international conflicts. In part, we succeeded because there was a clear humanitarian need to apply the rules on landmines to internal conflicts, where the great majority of the civilian casualties had occurred. But in addition, we had to include language in the Amended Protocol to address the concerns I just described: that applying the rules would not change the legal status of the conflict or the parties to the conflict; that the provisions would apply equally to all parties to the conflict, including the insurgent group; and that applying the rules could not constitute an excuse for intervention by outside powers.[31]

Further, although the other delegations did accept that the Protocol would apply in internal conflicts, this may have limited our ability to obtain certain provisions that we wanted. For example, we wanted a much more rigorous regime for compliance in the Amended Mines Protocol, including some provisions for inspections. The non-aligned countries were simply not interested in having such a degree of international intrusion into internal armed conflicts. Consequently, the United States will have to pursue this issue at the next amendment conference.

It is also the case that arms control agreements may affect military operations in internal conflicts, although one would not normally have expected this. For example, the 1972 Biological Weapons Convention[32] effectively precludes the use of biological weapons in internal conflicts because it prohibits their possession and use for any hostile purposes. Similarly, the 1993 Chemical Weapons Convention[33] prohibits all use or possession of chemical weapons, which effectively precludes their use in internal as well as international conflicts.

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31. Amended Protocol II, *supra* note 24, art. 1(3-6).

32. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583; T.I.A.S. 8062; 1015 U.N.T.S. 163.

33. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993.

IV. Cases before the International Court of Justice

A third area of developments in the law of armed conflict during this decade has come in litigating cases before the International Court of Justice (ICJ). The most prominent of these was the *Nuclear Weapons* case.[34] This case arose from requests by the World Health Organization and the UN General Assembly for an advisory opinion on the legality of the threat or use of nuclear weapons. The United States opposed both requests and tried unsuccessfully to convince the court not to answer them.

In the end, the court did give an opinion, and for the most part, it was quite satisfactory. In particular, the court rejected a number of arguments made by others against the legality of nuclear weapons, and parts of the court's opinion may have a desirable effect on the way in which the same issues are treated with respect to conventional weapons. Let me give some examples.

Opponents of nuclear weapons argued that their use was prohibited by international human rights law–particularly to so-called right to life, and by international environmental law–particularly the prohibition on damage to the environment of other states. We argued, and the court agreed,[35] that these peacetime legal concepts could not be applied directly and absolutely in time of armed conflict. Rather, they had to be treated as factors to be considered in accordance with the law of armed conflict, particularly with the rule of proportionality. That is, loss of life and environmental damage were factors to be weighed against the military advantage to be achieved by a particular operation, rather than treated as a basis for absolute prohibitions.

Nuclear opponents also argued that the use of nuclear weapons was prohibited under customary law because of their non-use since the end of World War II. We argued, and the court agreed,[36] that this was not so, for the reason that the non-use of nuclear weapons had nothing to do with any perception by the nuclear-weapon states that such use would be illegal, but was attributable to other good and sufficient political and military reasons. In fact, nuclear weapons have been and still are an important part of the

34. Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of July 8, 1996), 35 I.L.M. 809.

35. *Id.* paras. 24-34.

36. *Id.* paras. 64-67.

deterrent posture of a great many important states, including the United States and our NATO allies.

Similarly, nuclear opponents argued that the illegality of nuclear weapons is demonstrated by the many international agreements that have imposed progressively tighter restrictions on their use, possession, transfer, and delivery systems. We responded, and the court agreed,[37] that if anything, these agreements proved that there was no general prohibition on nuclear weapons use, since partial restrictions would have no purpose if all use of these weapons were illegal. The court said that at most these agreements indicate a trend toward a possible ultimate prohibition, but in and of themselves cannot demonstrate a current prohibition.

Further, nuclear opponents argued that the use of nuclear weapons is prohibited as a result of a series of UN General Assembly resolutions over the years, which characterized nuclear warfare as illegal. We argued, and the court agreed,[38] that General Assembly resolutions do not have independent force of law, and only have legal significance to the extent that they reflect customary law established by the practice of states. Here, there was no such customary practice.

Having disposed of these arguments, the key question before the court was whether nuclear weapons could be used in a manner that complied with the law of armed conflict; in particular, the rules on proportionality and discrimination between civilian and military objectives. Clearly and understandably, the court was troubled by this question. In the end, the court ruled by a 7-7 vote, with the tie broken by the vote of the Algerian President, that the use of nuclear weapons would "generally" be contrary to the law of armed conflict.[39]

However, the court declined to rule on the legality of nuclear weapon use in three important situations. The first was what the court called "the extreme circumstance of self-defense in which the survival of a state was at stake."[40] As we know, this circumstance has arisen many times during the past century, and nuclear weapons were created and have been retained for the specific purpose of deterring or stopping aggression that might

37. *Id.* paras. 54-63.
38. *Id.* paras. 68-73.
39. *Id.* para. 105(E).
40. *Id.*

threaten the survival of a state–for example, the feared Soviet invasion of western Europe.

Second, the court declined to rule on whether nuclear weapons could lawfully be used in belligerent reprisal[41]–that is, in proportionate response to a serious violation of the rules of armed conflict by another state. Such a situation might, for example, arise if an enemy used weapons of mass destruction and the threat or use of nuclear weapons was necessary to bring such action to an end. This, of course, is another fundamental reason why nuclear weapons have been acquired and retained.

Third, the court declined to rule on the legality of what it called "the policy of deterrence,"[42] by which it apparently meant the retention of nuclear weapons by one state with the avowed intent to use them if necessary to prevent aggression by another state. This, of course, is a third major reason for maintaining nuclear arsenals.

In short, the court declined to rule on the legality of the three main reasons for possessing and using nuclear weapons: to deter aggression, to prevent total defeat if war starts, and to deal with enemy use of weapons of mass destruction. In declining to answer these questions, the court avoided seriously upsetting either the opponents of nuclear weapons or the many states that rely on nuclear weapons for their ultimate security. In any event, avoiding these questions meant that the court's opinion does not require any change in the nuclear posture of the United States or of NATO.

One other case involving the Unites States and the use of force is currently before the court–the *Oil Platforms* case[43] against Iran. This case arose out of the so-called tanker war that occurred during the Iran-Iraq War of the 1980s. Iran had been conducting attacks on the U.S. shipping and other neutral shipping in the Gulf. In response, the U.S. Navy destroyed certain Iranian oil platforms that had been used to assist those attacks. Some years after the incidents, Iran sued the United States in the ICJ for the damage to the platforms and, for want of any better basis for jurisdiction, brought their action under an old bilateral treaty of commerce and navigation.[44]

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41. *Id.* para. 46.

42. *Id.* para. 67.

43. *Case Concerning Oil Platforms (Islamic Republic v. United States of America), available at* <www.icj-cij.org/icjwww/idocket/iop/iopframe.htm>.

44. Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. 3853, 284 U.N.T.S. 93.

Of course, we argued to the court that this treaty was never intended to govern the conduct of armed conflict. After lengthy proceedings, the court agreed with us in part, but kept for further litigation one of the parts of the Iranian complaint, in which Iran alleged that our attacks had interrupted maritime commerce protected by the treaty.[45] We then filed a counter-claim, based on Iran's attacks on U.S. shipping.[46]

The case will continue to the merits on that part of the Iranian complaint and the U.S. counter-claim. It will probably take years to complete the process of briefing and arguing the case, but in the end, the court may rule on some important issues concerning military operations, particularly, the scope of the right of self-defense, the interpretation and application of the rules of naval warfare, and the duties of neutral states in an armed conflict. This case may therefore produce some important international law in the end.

V. Results of Armed Conflict

Finally, I would like to turn to the third topic I wanted to cover this morning–namely, developments during the post-Cold War decade in the international law relating to the consequences of armed conflict.

A. War Crimes

Let me make a few basic points about the fundamental choices that the Security Council faced in the creation of the two ad hoc war crimes tribunals. In 1993, when the United States decided that we would support some form of mechanism to prosecute the egregious war crimes that were being committed in the former Yugoslavia, there was only limited precedent to guide us. The war crimes trials in Nuremberg and Tokyo had been carried out by the victorious Allied states, essentially in their authority as occupying powers in Germany and Japan, and that authority was not available in 1993 in the case of the former Yugoslavia.

Most of the proposals posited others for the creation of a war crimes tribunal would have done so by the negotiation and ratification of a treaty.

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45. *See Case Concerning Oil Platforms*, Judgment on Preliminary Objections, Dec. 12, 1996.

46. *See id.* Order on Counter-Claim, Mar. 10, 1998.

This had a number of disadvantages. First, we knew that negotiating such a treaty would be difficult and its ratification by sufficient states to bring it into force even more so. This would have resulted in a long process that would take many years, as has been demonstrated by the experience in trying to bring a permanent International Criminal Court into being. We simply did not have that kind of time in the case of the conflict in the former Yugoslavia.

Second, when such a treaty was brought into force, there was no reason to assume that the states that were the objects of war crimes allegations would ratify. The regime would therefore have been wholly ineffective. We did not have a guarantee that states that supported the process, including the United States, would be able to timely ratify such a treaty.

Third, such a treaty would only have mandatory legal effect to the extent that it was agreed by the particular ratifying states. The states that were the object of war crimes accusations could readily ignore the tribunal. There would be serious difficulty in convincing states that had not ratified the treaty to turn over indicted persons who might be found in their territory. The political, economic, and military power of the members of the Security Council would not necessarily support the tribunal's operation.

We therefore turned to another alternative and proposed that the tribunal be created by action of the Security Council under Chapter VII of the UN Charter. It was not self-evident that the Council had this authority, because there is nothing in Chapter VII referring specifically to the creation of judicial bodies, and some took the view that the creation of such a tribunal would be outside the Council's mandate. We were able to persuade the Council that this was not so, that in fact the tribunal would only be enforcing law that already existed by reason of the customary law created by the Nuremberg and Tokyo tribunals, and that there was nothing in the Charter that prevented the Council from creating such a tribunal if it determined that this was necessary to restore and preserve the peace. In due course, the Council unanimously acted to create the Tribunal for the former Yugoslavia,[47] and later created such a tribunal for Rwanda as well.[48]

There were many important advantages to this course of action. All states had an immediate obligation to cooperate with the tribunals. Some

47. S.C. Res. 808, U.N. SCOR (1993).
48. S.C. Res. 955, U.N. SCOR (1994).

did not fully cooperate, but at least the presence of such an obligation strengthened the United States and others in applying diplomatic and economic pressure to encourage compliance. Many states found it much easier to implement their obligations when they had the authority of the Council. The tribunals were in principle created immediately, and in practice came into operation as soon as administrative considerations made that possible.

You are probably familiar with the history of the tribunals since that point. They have had their "ups and downs." The most obvious problem was clear from the beginning, namely that the tribunals can only try persons over whom they have custody. In fact, the tribunals have now obtained custody over dozens of accused persons, but it is still the case that many indictees remain at large.

Nonetheless, compared with the prospects for this operation when it started, the situation is much improved. At the beginning, there was extreme skepticism that defendants of any significance would appear before the tribunals and considerable concern that its mere existence would disrupt the negotiation of settlements to the conflicts in the region. However, diplomatic negotiations have not been hampered by the tribunal process, and it is reasonable to predict that, before the tribunals have finished their work, a very substantial number of significant defendants will have been duly tried and convicted.

B. Compensation for War Damage

Finally, let me turn briefly to the question of compensation for the loss and injury suffered by victims of armed conflict. The aftermath of the Gulf War produced a major new development in this area.

Prior to the Gulf War, there had been claims commissions and tribunals, but nothing that could have coped effectively with the vast number of victims and size of losses that resulted from the Iraqi invasion and occupation of Kuwait. These commissions and tribunals tended to be bilateral adversarial proceedings that took an inordinately long time and to have limited resources at their disposal.

The Gulf War made it essential to develop an alternative regime. In addition to those killed and injured by Iraqi forces, there was wholesale theft and destruction of property in occupied Kuwait, many contractual

arrangements were terminated or disrupted, and millions of foreign workers were expelled, resulting in the loss of their property and livelihood. The destruction of oil wells and the spilling of oil into the Gulf caused tremendous damage to the Kuwaiti environment and natural resources.

Thus, we decided to take a fresh approach relying, once again, on the authority of the Security Council under Chapter VII of the Charter. Based on the argument that compensation for this damage was essential to maintaining long-term peace in the region, we proposed that the Council exercise its Chapter VII power to impose liability on Iraq for all the direct consequences of the war, and to create a UN Compensation Commission to adjudicate damages. The Council agreed.[49] The Commission which emerged was not an adversarial tribunal of the traditional sort, which Iraq could have tied up for years in procedural maneuvers. Rather, it was designed to function like an administrative body, to render decisions quickly and effectively on large categories of claims, and without the need to decide in each case whether Iraq was or was not responsible.

To finance the operation, we proposed that the Council levy a thirty percent deduction from future Iraqi oil export revenues, to be transferred into a compensation fund for payment of approved claims. The Council agreed, but actual revenues still depended on Iraq's willingness to resume oil exports under these conditions. After resisting this regime for years, Iraq finally began pumping oil under UN control, with the revenues going partly for compensation of war victims, partly for humanitarian relief in Iraq, and partly to finance UN operations.

After a slow start, the results of this effort are coming in nicely. To date, more than a million awards have been issued for a total of more than seven billion dollars, and more than two billion dollars have been paid from Iraqi oil export revenues. This, however, is only a start, since the total damage caused by the Gulf War certainly exceeded one hundred billion dollars, and recovery of that amount will still take a great many years. As the years go by, there will undoubtedly be political pressure from others to restrict or to terminate the deduction from Iraqi oil export revenues for these purposes. The United States will have to stick this process out with the same determination it has shown to date.

All in all, this claims program is unique, and is one or two orders of magnitude larger than any other international claims program ever

49. S.C. Res. 687, U.N. SCOR (1991), paras. 16-19.

attempted. At the same time, we have to recognize the unusual combination of circumstances that made such a program possible in the case of Iraq. First, Iraq was totally defeated in the war and was not in a position to demand or bargain for better terms. Second, we were able to harness an extremely large flow of resources–Iraq's oil exports–that has a very high margin of profit, above and beyond the costs of production, that could readily be tapped. Third, this flow of resources has been relatively easy for the international community to control, since it mostly flows out by way of tanker traffic on the high seas.

It is unlikely that such a serendipitous combination will occur very often in the future. For example, no comparable source of revenue has been available to finance compensation for the victims of the conflicts in the former Yugoslavia. Nonetheless, I think that important precedents are being created in terms of the methods by which the Compensation Commission is operating and the law on compensation issues that it is creating.

VI. Conclusion

I think you would agree that this first post-Cold War decade has been an interesting and hopefully fruitful period in terms of the development of international law and practice to meet the monumental problems presented by the armed conflicts of this new age.

CAMPELL V. CLINTON: THE "IMPLIED CONSENT" THEORY OF PRESIDENTIAL WAR POWER IS AGAIN VALIDATED

MAJOR GEOFFREY S. CORN[1]

I. Introduction

In the recent dismissal of the case *Campbell v. Clinton*,[2] the United States District Court for the District of Columbia adjudicated a constitutional challenge to the legal authority of the President to order the conduct of hostilities against Serbia.[3] The case against the President was filed by twenty-six members of the House of Representatives.[4] Judge Paul L. Friedman dismissed the case based on a lack of legislative standing.[5] However, a close examination of his opinion indicates that the true focus of the decision was the absence of a ripe dispute between the Congress and the President. This subtle emphasis on the lack of ripeness once again validates the reliance on the "implied consent" of Congress to support the constitutional authority of the President to order the conduct of military hostilities.[6]

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2. No. 99-1072, 1999 U.S. Dist. LEXIS 8630 (D.D.C. June 8, 1999).

3. *Id.* at *1.

4. *Id.*

5. *Id.*

II. Background

The case of *Campbell v. Clinton*[7] began on 30 April 1999, when Representative Tom Campbell, along with sixteen other members of the House of Representatives, filed a complaint for declaratory relief in the D.C. Circuit Court.[8] The complaint sought a declaration from the court that the President lacked constitutional authority for ordering continued combat operations. Accordingly, it alleged:

> The President of the United States is unconstitutionally continuing an offensive military attack by United States Armed Forces against the Federal Republic of Yugoslavia [FRY] without obtaining a declaration of war or other explicit authority from the Congress of the United States as required by Article I, Section 8, Clause 11 of the Constitution, and despite Congress' decision not to authorize such action.[9]

This challenge was based exclusively on a violation of the Constitution. However, the plaintiffs also sought a declaration that unless the President received explicit authorization from Congress to continue combat operations, the War Powers Resolution[10] mandated termination of such operations. "Additionally, [p]laintiffs seek a declaration that, pursuant to Section 1544(b) of the [War Powers] Resolution, the President must terminate the use of United States Armed Forces engaged in hostilities against the Federal Republic of Yugoslavia no later than sixty calendar days after [26 March] 1999."[11]

In response to the lawsuit, the Department of Justice, on behalf of the President, filed a motion to dismiss based on a lack of standing.[12] In a

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6. This Comment is intended to compliment the article published by the author in 1998, (Major Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?* 157 MIL. L. REV. 180 (1998)). This article concluded that the history of judicial resolution of war power disputes indicates that unless and until the Congress explicitly opposes a war-making initiative by the President, the authority of the President should be considered constitutionally valid.

7. *Campbell*, No. 99-1072, 1999 U.S. Dist. LEXIS 8630.

8. *See* Plaintiffs Complaint for Declaratory Relief (April 30, 1999)), *Campbell*, No. 99-1072, 1999 U.S. Dist. LEXIS 8630 (copy on file with author).

9. *Campbell*, No. 99-1072, 1999 U.S. Dist. LEXIS 8630, at *3.

10. Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C.A. §§ 1541-1548 (1998)).

11. Plaintiffs Complaint for Declaratory Relief (April 30, 1999)) at 4, *Campbell*, No. 99-1072, 1999 U.S. Dist. LEXIS 8630 (copy on file with author).

memorandum in opposition to the defendant's motion to dismiss,[13] the plaintiffs submitted a detailed argument to support their original request for declaratory relief. They asserted that because the House of Representatives had voted 213 to 213 against a concurrent resolution authorizing air and missile strikes against Yugoslavia,[14] not only had Congress explicitly declined to authorize the conflict, it had explicitly rejected support for the conflict. Thus, according to the plaintiffs, the President was acting against the express will of Congress in continuing to prosecute the war. According to the plaintiffs, this amounted to a clear violation of the Declaration Clause of the Constitution.[15]

In the alternative, the plaintiffs also asserted that continuing hostilities beyond the sixtieth day of operations, absent an express authorization from Congress for such operations, amounted to a violation of the War Powers Resolution.[16] The plaintiffs relied on the provisions of the War Powers Resolution that specifically mandates terminating hostilities sixty days after the hostilities were initiated, unless Congress has provided *explicit* legislative authority for continuation. According to the Resolution:

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) *specific statutory authorization*, or (3) a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces.[17]

This language indicates that except for the President's authority to "repel sudden attack," only a declaration of war or its functional legislative equivalent may be treated as war-making authorization from Congress. This requirement for an express authorization appears again in Section 1541, Congressional Action. In subsection (b), it allows an unauthorized deploy-

12. *Campbell*, No. 99-1072, 1999 U.S. Dist. LEXIS 8630.

13. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, *Campbell*, No. 99-1072, 1999 U.S. Dist. LEXIS 8630 (copy on file with author).

14. S. Con. Res. 21, 106th Cong. (1999).

15. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 12-16, *Campbell*, No. 99-1072, 1999 U.S. Dist. LEXIS 8630 (copy on file with author).

16. Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C.A. §§ 1541-1548 (1998)).

17. *Id.* (emphasis added).

ment to continue beyond sixty days only when authorized by a declaration of war or specific statutory authorization.[18] Finally, in Section 1547, "Interpretation of Joint Resolution," the following language appears:

> (a) Authority to introduce United States Armed Forces into hostilities or situations wherein involvement in hostilities is clearly indicated by the circumstances *shall not be inferred–*
>
> *(1) from any provision of law (whether or not in effect before [7 November], 1973), including any provision contained in any Appropriations Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter . . . .*[19]

Seizing on this language, the plaintiffs asserted that neither the vote by Congress defeating a resolution calling for an immediate termination of all hostilities,[20] nor the overwhelming passage of an appropriations bill specifically intended to fund the conflict through the fiscal year,[21] satisfied the constitutional requirement that Congress authorize the conflict.[22] Because this was the first large scale conflict to ostensibly violate the cited provisions of the War Powers Resolution, this case provided the first truly significant invocation of that law to restrict a presidential war-making initiative.[23]

On behalf of the President, the Justice Department filed a reply in support of the defendant's motion to dismiss.[24] The Justice Department asserted three bases to support dismissal. First, that based on the "legislator standing" test established by *Raines v. Byrd*,[25] the plaintiff legislators could not satisfy the legal standard for maintaining the challenge to the President.[26] Second, the facts did not support the conclusion that the controversy between the Congress and the President was judicially "ripe."[27] Third, that because the evidence indicated cooperation between the Presi-

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18. *Id.*

19. War Powers Resolution, 50 U.S.C. § 1547 (1988) (emphasis added).

20. H.R. Con. Res. 82, 106th Cong. (1999).

21. H.R. Res. 130, 106th Cong. (1999).

22. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 27-29, Campbell v. Clinton, No. 99-1072, 1999 U.S. Dist. LEXIS 8630 (D.D.C. June 8, 1999) (copy on file with author).

dent and Congress, the request for judicial intervention called for adjudication of a "political question."[28]

Although the Justice Department asserted three alternate theories supporting the motion, the theories all relied on one critical fact: there was no "impasse" between the Congress and the Executive Branch.[29] According to the filings, this lack of impasse was established by evidence that the Congress had taken measures to support the military operation against Yugoslavia:

> [C]ontrary to plaintiffs' allegation that a constitutional "impasse" exists, Congress has continued to consider and vote on legislation relating to the use of military force in the region of Kosovo, and recently expressed its support for the President's actions by providing billions of dollars in specific funds for the United States' military operations. In the face of such continued action by Congress in consultation with the President, plaintiffs cannot successfully argue that an impasse has been reached. . . .[30]

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23. Although the War Powers Resolution had been invoked in the past to oppose presidential initiatives, the cases all involved relatively small scale military deployments into environments where hostilities between U.S. forces and opposition forces was purely speculative. These cases all involved challenges to U.S. military initiatives in Central America during the 1980s. *See, e.g.*, Crockett v. Reagan, 558 F. Supp. 893, 899 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985); Lowry v. Reagan, 676 F. Supp. 333, 339 (D.D.C. 1987), *aff'd*, No. 87-5426 (D.C. Cir. Oct. 17, 1988).

The only other military operation since the passage of the War Powers Resolution to generate a judicial challenge to the authority of the President to wage war was the Persian Gulf Conflict. *See* Dellums v. Bush, 752 F. Supp. at 1141 (D.D.C. 1990) (dismissing for lack of ripeness a challenge to the military build up in Persian Gulf, which was filed by members of both houses of Congress). However, the express legislative authorization provided for the conduct of the Gulf War ultimately mooted any War Powers Resolution issue.

24. Reply in Support of Defendant's Motion to Dismiss (June 1, 1999), Campbell v. Clinton, No. 99-1072, 1999 U.S. Dist. LEXIS 8630 (D.D.C. June 8, 1999) (copy on file with author).

25. 521 U.S. 811 (1997) (holding that legislator plaintiffs have standing for claimed institutional injury only when they demonstrate their votes were sufficient to defeat the legislation at issue, and that their votes were completely nullified by subsequent action).

26. Reply in Support of Defendant's Motion to Dismiss (June 1, 1999) at 1, *Campbell*, No. 99-1072, 1999 U.S. Dist. LEXIS 8630 (copy on file with author).

27. *Id.*

28. *Id.*

29. In the opinion of this author, unless and until Congress explicitly opposes a presidential war making initiative, the orders of the President should be considered constitutionally authorized. *See* Corn, *supra* note 6.

This lack of "impasse" was the *sine qua non* underlying all three bases for dismissal. Regarding the "legislator standing" theory, the lack of impasse proved that continuing to wage the war was in no way a "complete nullification" of any vote cast by the plaintiffs.[31] Regarding the ripeness theory, the lack of impasse proved that no judicially ripe "case or controversy" existed between the Congress and the President.[32]

Finally, with regard to the "political question" theory, the evidence of war-making policy cooperation between the President and Congress meant that judicially resolving the case would require "this Court to declare that [U.S.] forces must be removed from the [FRY] where Congress has chosen not to do so."[33] Such premature judicial intervention would therefore contradict the will of both political branches of the government.[34] The centrality of this lack of impasse is highlighted by the following language used by the Department of Justice:

> Plaintiffs also fail to address the key factor that makes this case premature: no constitutional impasse exists to justify judicial intervention into the ongoing dialogue between the Executive and Legislative branches regarding the situation in the FRY. In advance of such an impasse, plaintiff's claims are not ripe for judicial review. It is not for the Court to confront the President on his Kosovo policy in Congress' name at the behest of a small minority of the House.[35]

There are several significant aspects of the Justice Department's approach to support the motion to dismiss. First, and most significant from the perspective of its relationship to analysis of presidential war power, is the emphasis placed on evidence of congressional support for the President's policy. As noted above, every theory asserted by the Department relied upon such evidence. This emphasis is understandable in the context of prior decisions related to the war power of the President.[36] However, it

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30. Reply in Support of Defendant's Motion to Dismiss (June 1, 1999) at 2, *Campbell*, No. 99-1072, 1999 U.S. Dist. LEXIS 8630 (copy on file with author).

31. *Id.* at 5-7.

32. *Id.* at 9-12.

33. *Id.* at 1.

34. For an analysis of the relationship between evidence of cooperation between the Congress and the President to the application of the political question doctrine to war power cases, *see* Corn, *supra* note 6, at 218-31.

35. Reply in Support of Defendant's Motion to Dismiss (June 1, 1999) at 9-10, *Campbell*, No. 99-1072, 1999 U.S. Dist. LEXIS 8630 (copy on file with author).

is inconsistent with the approach taken in previous war power cases, namely that the President's inherent war making authority amounted to an independent constitutional basis for his actions.[37] While this theory of constitutionality supported the President in this case, it did so by acknowledging the constitutional importance of demonstrating some form of congressional support for the President. This seems to concede that proof of the absence of such support, in the form of express congressional opposition to a presidential war-making initiative, could deprive the President of constitutional authority.

Second, the Justice Department did not argue that the President possessed unilateral constitutional authority to order the operations at issue. As noted above, this "inherent" power argument has traditionally been asserted as a source of the President's constitutional authority to order military operations.[38] Instead, the Department emphasized the evidence of cooperation between the President and the Congress.

The final aspect of the Justice Department approach that seemed significant was the almost total disregard of the challenge to the President based on the provisions of the War Powers Resolution. The only time this issue was addressed was in relation to the Department's assertion that the case was barred by the political question doctrine, when it asserted the doctrine applied with equal force to both constitutional and statutory challenges. Apparently, the Department did not consider the War Powers Resolution issue significant. In hindsight, this appears to have been a valid conclusion.

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36. *See* Corn, *supra* note 6.

37. *See* Dellums v. Bush, 752 F. Supp. at 1141 (D.D.C. 1990); *see generally* LEON FRIEDMAN & BURT NEUBORNE, UNQUESTIONING OBEDIENCE TO THE PRESIDENT: THE ACLU CASE AGAINST THE ILLEGAL WAR IN VIETNAM (1972).

38. *See* FRIEDMAN & NEUBORNE, *supra* note 37; *see also* Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903 (1994); Richard Nixon, *Veto of the War Powers Resolution*, 5 PUB. PAPERS 893 (Oct. 24, 1973).

III. The Decision of the Court

On 8 June 1999, Judge Paul L. Friedman of the United States District Court for the District of Columbia granted the President's motion to dismiss.[39] The stated basis for his ruling was that the plaintiffs did not have standing to raise the claims that the President's continued execution of the conflict against Yugoslavia violated the Constitution and the War Powers Resolution.[40]

In a fourteen-page decision, however, Judge Friedman revealed the underlying rationale for his decision. Like the Justice Department, Judge Friedman focused the lack of an "impasse" between the two political branches as the primary justification for dismissing the challenge. As a result, this decision supports the conclusion that while the Constitution does mandate a congressional role in war-making decisions, the "implied consent" of Congress in support of the President's war making initiatives satisfies this constitutional requirement.[41]

After an extensive discussion of the constitutional and statutory basis for the lawsuit, and a summary of facts related to Operation Allied Force, Judge Friedman discussed the rationale for the dismissal. He began by summarizing the various theories relied upon by the courts in prior war power cases to impose jurisdictional bars against such challenges. These included lack of standing, lack of ripeness, equitable or remedial discretion, and the political question doctrine.[42] He explained that applying these theories had been motivated by separation of powers concerns, and specifically the reluctance of the Judiciary "to intercede in disputes between the political branches of government that involve matters of war and peace."[43]

Judge Friedman then noted that each of these bases had been consumed by the legislative standing test established by the Supreme Court in the *Raines* case, in 1997. Under this standard, to establish standing, the legislator "plaintiffs seeking to obtain relief must allege 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'"[44] Judge Friedman concluded that

39. Campbell v. Clinton, No. 99-1072, 1999 U.S. Dist. LEXIS 8630 (D.D.C. June 8, 1999).

40. *Id.*

41. *See* Corn, *supra* note 6.

42. *Campbell*, No. 99-1072, 1999 U.S. Dist. LEXIS 8630, at *7-*8.

43. *Id.* at *8.

because the Congress and the President were not at an "impasse" over the war-making policy related to Yugoslavia, the plaintiffs could not show that they had suffered any personal injury through vote nullification. Absent such an impasse, the plaintiffs could not establish that any vote they had cast was actually being "flaunted" by the President. Thus, it was the lack of impasse, or a ripe dispute between the Congress and the President over the war, that led to the standing-based dismissal. According to the court:

> Plaintiffs here allege that the President's actions have deprived them of "their constitutional right and duty under Article I, Section 8, Clause 11, to commit this country to war, or to prevent, by refusing their assent, the committing of this country to war," and that the President has "completely nullified their vote against authorizing military air operation and missile strikes against Yugoslavia."
>
> . . . .
>
> In the circumstances presented, the injury of which the plaintiffs complain–the alleged "nullification" of congressional votes defeating the measures declaring war and providing the President with authorization to conduct air strikes–is not sufficiently concrete and particularized to establish standing. To have standing, legislative plaintiffs must allege that their votes have been "completely nullified," or "virtually held for naught." *Such a showing requires them to demonstrate that there is a true "constitutional impasse" or "actual confrontation" between the legislative and executive branches*; otherwise courts would "encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict." In the Court's view, there is no such constitutional impasse here.[45]

According to the court, the key fact relied on to conclude that no such constitutional impasse existed was that "congressional reaction over the air strikes . . . sent distinctly mixed messages, and that congressional equivo-

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44. *Id.* at *9 (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)).

45. *Id.* at *11 (citations omitted) (emphasis added).

cation undermines plaintiff's argument that there is a direct conflict between the branches."[46]

Contrary to the hopes of the plaintiffs, the court did not regard the 213 to 213 defeat of the Concurrent Resolution to authorize air and missile strikes as an unambiguous stand by Congress against the President. According to the court: "[T]he two votes at issue in this case, however, do not provide the President with . . . an unambiguous directive; neither vote facially required the President to do anything or prohibited him from doing anything."[47] Instead, the court noted that the defeat of a resolution directing the President to remove U.S. forces from operations against Yugoslavia,[48] and subsequent passage of the "Supplemental Emergency Appropriation Act that provides funding for the activities being undertaken in the [FRY],"[49] indicated Congress supported continued military operations.

This reliance by the court on absence of an impasse between the two political branches is not a new approach to deal with such cases. This analysis formed the basis of several prior dismissals of war power challenges.[50] Other aspects of the opinion do seem significant. First, as with these prior dismissals, Judge Friedman clearly indicated that should such an impasse emerge between the Congress and the President, the likelihood of judicial resolution would be significant. According to the court:

> If Congress had directed the President to remove forces from their positions and he had refused to do so or if Congress had refused to appropriate or authorize the use of funds for the air strikes in Yugoslavia and the President had decided to spend that money (or money earmarked for other purposes) anyway, that likely would have constituted an actual confrontation sufficient to confer standing on legislative plaintiffs . . . .
>
> Congressional reaction to the air strikes has sent distinctly mixed messages, and the congressional equivocation undermines the plaintiffs' argument that there is a direct conflict between the branches . . . . Had the four votes been consistent and

46. *Id.* at *12.

47. *Id.*

48. *See* H.R. Con. Res. 82, 106th Cong. (1999).

49. *See* 1999 Emergency Supplemental Appropriations Act, Pub. L. No. 106-31, 113 Stat. 57.

50. *See generally* Corn, *supra* note 6.

> against the President's position, and had he nevertheless persisted with air strikes in the face of such votes, there may well have been a constitutional impasse.[51]

Second, the court indicated that the lack of standing for legislative plaintiffs did not translate into a lack of standing for any plaintiff. In fact, the court almost seemed to invite a challenge to the President's policy by a service member ordered to duty in Operation Allied Force. In a footnote inserted after concluding that the legislative plaintiffs could not show particularized harm from the actions of the President, Judge Friedman noted:

> A finding that the legislative plaintiffs in this case lack standing under these circumstances does not preclude judicial resolution of a challenge to the President's actions. Counsel for the President appears to have acknowledged that an individual alleging personal injury from the President's alleged failure to comply with the War Powers Clause or the War Powers Resolution, as for instance a service person who has been sent to carry out the air strikes against the [FRY], would have standing to raise these claims . . . The Court also notes that the political question doctrine does not apply to suits brought by individuals in their personal capacity.[52]

Although only a footnote, it seems clear that Judge Friedman was careful to limit the scope of his opinion to a legislative challenge to a war power decision, and not suggest applicability to any challenge of such a decision. This suggestion seems more significant because service members have turned to the federal courts in the past to attempt to block deployment orders on constitutional grounds,[53] and therefore could be expected to do so again in the future.

It is also significant that the court refused to treat a war power issue as a per se non-justiciable political question. The court noted that this had been one of the theories used by the Justice Department to support dis-

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51. *Campbell*, No. 99-1072, 1999 U.S. Dist. LEXIS 8630, at *12.

52. *Id.* at *11 n.8.

53. *See, e.g.*, United States v. Bolton, 192 F.2d 805 (2d Cir. 1951) (challenging the legality of the Korean War); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970) (challenging the legality of the Vietnam War); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971) (challenging the legality of the Vietnam War); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973) (challenging the legality of the Vietnam War); Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990) (challenging the legality of the Persian Gulf War).

missal of the lawsuit.[54] However, the Court succinctly rejected the routine assertion that any issue involving war-making decisions automatically falls into the category of "political question":

> In addition to standing and ripeness, the President also has argued that this case raises a non-justiciable political question. To the extent that the President is arguing that every case brought by a legislator alleging a violation of the War Powers Clause raises a non-justiciable political question, he is wrong.[55]

Of course, the court was able to avoid determining whether the President's assertion was accurate because of the standing based dismissal. However, as with the previous caveat, it is interesting that Judge Friedman went out of his way to reject the per se application of the doctrine espoused by the Justice Department. This approach is consistent with war power cases from both the Vietnam War and the Persian Gulf War, which reached the same conclusion regarding the political question doctrine as did Judge Friedman.[56]

The final interesting aspect of the decision is the almost total absence of analysis of whether the War Powers Resolution applied to the dispute. This seems particularly significant because the plaintiffs specifically invoked a violation of the Resolution as a basis for the challenge. However, in spite of what appeared to be a valid assertion by the plaintiffs–continued execution of military operations against Yugoslavia violated the Resolution–the court apparently concluded that the lack of a ripe controversy between the President and the Congress subsumed the War Powers Resolution challenge. According to the court:

> For all the reasons, plaintiffs have failed to establish a sufficiently genuine impasse between the legislative and executive branches to give them standing. The most that can be said is that Congress is divided about its position on the President's actions in the [FRY] and that the President has continued with air strikes

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54. *Campbell*, No. 99-1072, 1999 U.S. Dist. LEXIS 8630, at *9 n.5.

55. *Id.* The court continued by citing *Baker v. Carr*, 369 U.S. 186 (1962): "'It is error to suppose that every case or controversy which touches on foreign relations lies beyond judicial cognizance . . . [The Court instead must conduct] a discriminating analysis of the particular question posed in order to determine whether the issue is justiciable) . . . .'" *Id.* (citations omitted).

56. *See* Corn, *supra* note 6, at 186-96 (analyzing the justiciability of war power issues).

> in the face of that divide. Absent a clear impasse between the executive and legislative branches, resort to the judicial branch is inappropriate.[57]

By establishing an implied ripeness requirement for a War Power Resolution-based challenge, the court seemed to "gut" whatever significance that statute still has. In short, the court made the enforceability of the Resolution contingent upon the same facts that would support a constitutional challenge to a president's war making initiative–impasse between the President and Congress. Because such an impasse would require the affirmative action of the Congress in *opposition* to the President, the War Powers Resolution provisions indicating that the President must cease military operations absent express congressional *authorization* becomes virtually meaningless. A failure of Congress to act does not constitute such an authorization under the Resolution. However, because it also does not amount to express opposition to the President, and therefore does not result in an "impasse" between the Executive and Judicial Branches, a failure to satisfy the requirements of the Resolution results in a violation of a statute that will be considered non-justiciable by a court.

IV. Conclusion

Although dismissed for lack of standing, this judicial challenge to the President's decision to use armed force against Yugoslavia ultimately became moot because of the cease-fire that ended the conflict. As a result, the parties did not pursue further action on the case. Arguably, this decision is relatively insignificant in the landscape of constitutional war powers analysis. However, as indicated above, this case confirms a consistent course followed by the judiciary when asked to adjudicate the legality of presidential decisions to engage the United States Armed Forces in hostilities: focus on whether such a challenge presents a truly ripe issue. Unless this ripeness requirement is satisfied, the President's actions will be presumed to meet the requirements of the Constitution. A challenge will only be cognizable if Congress manifests express opposition to such action. Thus, the legality of war making is not based on a theory of unilateral pres-

57. *Campbell*, No. 99-1072, 1999 U.S. Dist. LEXIS 8630, at *14.

idential war power, but on a theory of cooperative policy making by the two branches of government who share this awesome authority.

As discussed in the article, this Comment serves to compliment, this conclusion has profound significance for military leaders who are ordered to execute such operations. The conclusion provides them with a concrete rationale to support the conclusion that their executed orders comply with the Constitution they swore to uphold, yet preserves for the Congress the power to challenge a President who it believes has acted beyond the interests of the nation.

REPRESENTING THE AGENCY BEFORE THE MERIT SYSTEMS PROTECTION BOARD: A HANDBOOK ON MSPB PRACTICE AND PROCEDURE[1]

REVIEWED BY RICHARD W. VITARIS[2]

For many years, federal agency labor attorneys learned their business, at least in part, from a concise, blue-covered handbook last published by the Office of Personnel Management (OPM) in 1984 called *Representing the Agency Before the Merit Systems Protection Board*.[3] The book provided a step-by-step explanation of how to represent an agency before the Board and even included sample pleadings. It was a godsend for the novice and overworked administrative law attorney, who lamented its loss when it went out of print.[4]

Since 1984, OPM, like many federal agencies, has downsized, and the quality and quantity of guidance OPM provides to personnel specialists and labor law attorneys has eroded. The *Federal Personnel Manual*, which had provided detailed guidance on processing personnel actions, was abolished by the Clinton administration to cut down on "red tape."[5] It has become more difficult than ever for an agency to get its actions sustained before the Board.[6]

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1. HAROLD J. ASHNER, REPRESENTING THE AGENCY BEFORE THE MERIT SYSTEMS PROTECTION BOARD: A HANDBOOK ON MSPB PRACTICE AND PROCEDURE (Arlington, Virginia: Dewey Publications, Inc. 1998); 600 pages, $95.00 (softcover).

2. LL.M. Labor law, The George Washington University National Law Center; J.D., *with highest honors*, Rutgers University School of Law, Camden; B.A., Georgetown University. The author is an administrative judge with the United States Merit Systems Protection Board, Atlanta Regional Office. Before his appointment as an administrative judge, the author served as both a civilian attorney with the Department of the Army and as an active duty Army judge advocate. The views expressed are solely those of the author and do not purport to reflect the position of the Merit Systems Protection Board.

3. HAROLD J. ASHNER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD (1984).

4. *See* Richard W. Vitaris, *Toward the Simplification of Civil Service Disciplinary Procedures*, 150 MIL. L. REV. 382, 386 (1995) ("Although the handbook would pay for itself if it prevented an agency from losing even a single removal action, OPM did not keep it updated and it is now out of print.").

5. Although the Federal Personnel Manual (FPM) has been abolished, it can continue to provide useful guidance in appropriate circumstances. *Cf.* Maryland v. Office of Personnel Management, 140 F.3d 1031, 1034 (Fed. Cir. 1998) (noting that until OPM publishes another interpretation of the reduction in force (RIF) regulations, the FPM remains a valuable resource for the purpose of construing the RIF regulations).

Representing the Agency before the Merit Systems Protection Board is now back. Mr. Ashner, a co-author of OPM's original publication, has authored a complete rewrite, which is up-to-date and expanded to include new areas of MSPB practice. The book reflects Mr. Ashner's considerable experience in civil service law and procedure. Mr. Ashner served as a hearing officer with the Federal Employee Appeals Authority, a predecessor agency to the MSPB. At the MSPB, he prepared final decisions for the full Board on petitions for review. While at OPM, he coordinated OPM intervention in MSPB cases, and he advised and trained legal and personnel officials from other agencies on employee relations and appeals issues.[7]

The new book provides the equivalent of a weeklong introductory training course on MSPB practice. Mr. Ashner takes the mystery out of adverse action appeals by explaining in plain English concepts such as nexus, the *Douglas* factors,[8] and the performance opportunity period.[9] The book provides far more than an overview, with considerable discussion on the most typical case, a disciplinary action taken against an employee for misconduct under Chapter 75.[10] The book contains a more limited but nonetheless adequate treatment of performance based actions Chapter 43,

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6. The Board's annual reports for the last few years reflect little change in the percentage of agency actions that are affirmed by the Board. However, Board case law has generated more work for the agency representative. For example, in *Wynne v. Department of Veterans Affairs*, 75 M.S.P.R 127, 133-35 (1997), a case in which there was no hearing, the Board held that the agency-imposed penalty was not entitled to deference because the decision letter did not show whether any specific mitigating factors were considered. The Board gave no weight to the decision letter's general reference to consideration of the "*Douglas* factors because that type of general reference does not necessarily show that the deciding official actually considered any specific mitigating factors." *Id.* at 128. Thus, today's labor counselor must devote considerably more time and attention to the decision letter's explanation of the agency's penalty determination.

7. Mr. Ashner served in various capacities with the MSPB, OPM, and other federal agencies. He is currently the Assistant General Counsel for Legislation and Regulations at the Pension Benefit Guaranty Corporation.

8. Douglas v. Veterans Admin., 5 M.S.P.R. 280 (1981). When an employee challenges an adverse action (e.g., discharge) in the ordinary course by initiating MSPB review, the government, to have the action upheld, must establish, one, that the charged conduct occurred, two, that there is a nexus between that conduct and the efficiency of the service, and, three, that the penalty imposed is reasonable. *See* Pope v. United States Postal Serv., 114 F.3d 1144, 1147 (Fed. Cir. 1997).

9. Before initiating an action for unacceptable performance under 5 U.S.C.A. § 4303 (West 1999), an agency must give the employee a reasonable opportunity to demonstrate acceptable performance. *See* Smith v. Department of Health & Human Serv., 35 M.S.P.R. 101, 104 (1987).

even including a discussion of how an agency representative should choose between taking an action under Chapter 75 and under Chapter 43.[11]

It remains, however, an introductory primer and not a treatise on MSPB law and procedure. Treatment of the more exotic types of Board cases such as individual right of action (IRA) appeals under the Whistleblower Protection Act,[12] or the new and ever expanding area of claims under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),[13] is insufficient, in that an agency representative is forced to look elsewhere for adequate introductory guidance on these types of cases.

Determining the length and scope of a "Handbook on MSPB Practice and Procedure," as the book is subtitled, is no easy task. Mr. Ashner's 600 page volume strikes a fine balance between the gargantuan treatise by Peter Broida, *A Guide to Merit Systems Protection Board Law and Practice*,[14] which weighs in at a hefty 3544 pages, and one of the superficial 50-100 page guidebooks for supervisors about the MSPB or about adverse actions that are available from a number of publishers.[15]

Mr. Ashner states in his preface that his goal is to prepare a concise summary, in plain English, of everything an agency representative needs to know to be an effective advisor and advocate in MSPB cases.[16] The book is clearly written. It is a useful guidebook not only for its intended audience of agency representatives, but also for agency managers and supervisors who seek to learn more about the disciplinary process; appellant's representatives may also find it useful.

An agency representative need not consult any reference books other than Mr. Ashner's to prepare for a typical adverse action appeal, except for

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10. A federal agency has two avenues to discipline a civilian employee. Chapter 75 allows an agency to take an action against an employee for such cause as will promote efficiency of the service. *See* 5 U.S.C.A. § 7513(a). Chapter 43 allows an agency to reduce in grade or remove an employee for unacceptable performance. *Id.* § 4303.

11. ASHNER, *supra* note 1, at 80-82.

12. Pub. L. No. 101-12, 103 Stat. 16 (1989).

13. Pub. L. No. 103-353, 108 Stat. 3149 (codified beginning at 38 U.S.C. § 4301).

14. PETER BROIDA, A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW AND PRACTICE (1998) (softcover).

15. For example, FPMI Communications, Inc., offers a series of guidebooks for supervisors in the $19-$29 price range, with such titles as *Federal Manager's Guide to Discipline* and *RIF and the Federal Employee, What you need to Know.*

16. ASHNER, *supra* note 1, at iii.

the individualized research into MSPB case law necessary to address the particular facts and circumstances of the case. The book, however, does not meet the author's goal of telling an agency representative everything he needs to know to be an effective advisor and advocate. This failure is not so much a criticism, as it is a statement that Mr. Ashner's goal was too ambitious given the complexity of current MSPB practice and procedure.

For example, Mr. Ashner's book does little to explain the complexity of charging before the MSPB, except to lay out some bare-boned boilerplate.[17] He does not discuss the pros and cons of whether to charge an employee with a specific label charge, (that is, theft of government property versus using a generic charge such as, conduct unbecoming a federal employee) or even using no label for the charge at all.

An effective agency representative should know that nothing in law or regulation requires that an agency affix a label to a charge of misconduct. If the agency so chooses, it may simply describe actions that constitute misbehavior in a narrative form, and have its discipline sustained if the efficiency of the service suffers because of the misconduct.[18] If, on the other hand, an agency chooses to label an act of misconduct, then it is bound to prove the elements that make up the legal definition of that charge, if there are any. Much of the relevant case law regarding an agency's labeling of its charge discusses the analysis of those elements, and the Board's responsibility regarding that analysis.[19] There is no requirement, though, that the Board imposes on the agency an obligation to label specifically the misconduct, if it chooses not to do so.[20]

Another gap in *Representing the Agency before the Merit Systems Protection Board*, is its inadequate discussion of mixed case procedures.[21] The book does little more than cite the reader to the applicable regulations governing mixed cases. The book's failure to discuss substantive issues of discrimination law is not a source for significant criticism, however. Incorporating a detailed discussion of discrimination law into this book would not have been prudent. An adequate summary of discrimination law would warrant at least 200 pages, expanding the scope of Mr. Ashner's book by one third. Indeed, West Publishing Company's elementary

17. *Id.* at 47.

18. *See, e.g.*, Boykin v. United States Postal Serv., 51 M.S.P.R. 56, 58-59 (1991).

19. *See, e.g.*, Chauvin v. Department of the Navy, 38 F.3d 563, 565-66 (Fed. Cir. 1994); 918 F.2d 170, 171-72 (Fed. Cir. 1990).

20. Otero v. United States Postal Serv., 73 M.S.P.R. 198, 202 (1997).

primer, *Federal Law of Employment Discrimination in a Nutshell*, runs more than 300 pages.[22]

The slight treatment given mixed case procedures is a limitation, however. While Mr. Ashner alerts the reader that in a mixed case the employee can elect to file an appeal, a discrimination complaint, or a grievance,[23] the agency labor counselor also must be familiar with the two different processes to be followed depending upon whether the employee files an Equal Employment Opportunity (EEO) complaint in the mixed case or an appeal to the Board.[24]

For example, to adequately counsel management, the labor counselor needs to know that when an employee files an EEO complaint in a mixed case (as opposed to an appeal to the Board), a final agency decision is issued on the discrimination claim based solely on the agency's investigation. Further, the labor counselor should know that there is no right to a hearing before an EEO Commission (EEOC) administrative judge.[25] The hearing, if any, will be before the MSPB after the employee subsequently files an appeal to the Board following receipt of his final agency decision.[26]

Similarly, an agency labor counselor should know that if the employee initially elects to file an appeal to the MSPB rather than a discrimination complaint with the agency, and the appeal is subsequently dismissed by the MSPB for lack of jurisdiction, the discrimination claims do not simply go away. Rather, the agency is required to promptly notify the individual in writing of the right to contact an EEO counselor within forty-five days of receipt of this notice and to file an EEO complaint.[27]

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21. A "mixed case" appeal is an appeal to the Board from an adverse personnel action, coupled with an allegation that the action was based on prohibited discrimination. *See* 5 U.S.C.A. § 7702 (West 1999); 29 C.F.R. § 1614.302(a)(2) (1999). For example, an appeal involving a removal from service by a career employee in the competitive service who alleges her removal was based upon sex discrimination would be a "mixed case" because the Board would have jurisdiction over the removal action. On the other hand, an appeal of a 14-day suspension, which is alleged to be based on sex discrimination, would not be mixed because the Board does not have jurisdiction over a suspension for 14 days or less. *See* 5 U.S.C.A. § 7512(2); Meglio v. Merit Systems Protection Bd., 758 F.2d 1576, 1578 (Fed. Cir. 1984).

22. MACK A. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL (3rd ed. 1992) (softcover). The Nutshell Series is a popular series of short legal guidebooks designed to provide a succinct exposition of the law.

23. ASHNER, *supra* note 1, at 16.

While Mr. Ashner might have had a more expansive treatment of some subjects, the subjects he does discuss–which include virtually everything that an agency representative would need to know concerning the routine non-mixed case adverse action appeal–are exceptionally well presented. Moreover, *Representing the Agency before the Merit Systems Protection Board* provides important, highly practical advice in addition to its

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24. An employee may initiate a mixed case directly with the Board and seek a decision on both the appealable action and the discrimination claim. *See* 5 U.S.C.A. § 7702(a)(1). The review rights that follow the Board's disposition of a mixed case differ from an ordinary personnel case in that the employee may appeal to the EEOC.

After an administrative judge issues an initial decision in a mixed case and the initial decision becomes the final decision of the Board, *see* 5 U.S.C.A. § 7701(e); 5 C.F.R. § 1201.113 (1999), the employee may file a petition for review with the EEOC. *See* 5 U.S.C.A. §§ 7701(e)(1), 7702(b); 5 C.F.R. § 1201.163. If the employee seeks review before the EEOC and the EEOC agrees to consider the decision, the EEOC can concur in the Board's final decision, or it can issue a new final decision. *See* 5 U.S.C.A. § 7702(b). Once the EEOC concurs in a final decision of the Board, the decision becomes judicially reviewable in federal district court. *See id.* § 7702(b)(5)(A). The Board then has no further jurisdiction to review the matter. *See* Williams v. United States Postal Serv., 967 F.2d 577, 579 (Fed. Cir. 1992).

An employee may also initiate a mixed case appeal by filing an EEO complaint with his employing agency. 29 C.F.R. § 1614.302(b). In that event, the EEO complaint is processed normally except that the agency issues a final agency decision on the discrimination complaint after the agency's investigation. There is no hearing before an EEOC AJ. *Id.* § 1614.302(d)(2). If the employee receives an adverse final agency decision, the employee may appeal that decision to the MSPB, not to the EEOC.

Another important difference between a mixed case and normal Board appeal is the employee's appellate rights following an adverse decision. Once the Board issues a final decision in a mixed case–regardless of how the appeal was initiated–the employee may not appeal to the U.S. Court of Appeals for the Federal Circuit which is not empowered to decide discrimination claims in mixed cases. *See* 5 U.S.C.A. § 7703(b). If an individual wishes to appeal to the Federal Circuit from an unfavorable final decision in a mixed case, she must abandon her discrimination claim and proceed before the Federal Circuit solely with respect to the adverse personnel action. *See* Daniels v. United States Postal Serv., 726 F.2d 723, 724 (Fed. Cir. 1984).

25. 29 C.F.R. § 1614.302(d)(2).

26. An employee may file an appeal to the Board within 30 days after he receives the final agency decision on his discrimination claim. 5 C.F.R. § 1201.154(b)(1). Thereafter, the appeal will be adjudicated in accordance with the Board's ordinary procedures, which afford an appellant the right to a hearing. *Id.* § 7701(a)(1) (providing that where an employee "submit[s] an appeal to [the Board] from any action which is appealable to the Board under any law, rule, or regulation," he "shall have the right to a hearing"); *id.* § 7702(a)(1) ("[I]n the case of any employee. . ." who "has been affected by an action which the employee . . .may appeal to [the Board]" and who "alleges that a basis for the action was discrimination[,] . . . the Board shall . . . decide both the issue of discrimination and the appealable action[.]").

27. 29 C.F.R. § 1614.203.

discussion of applicable law and regulation. For example, the book contains seven pages of essential questions for a labor counselor or personnel specialist to ask in preparing a notice of proposed adverse action. Here are just a few:

> *Attendance Violations*:
>
> What is the employee's leave pattern (e.g., AWOL, heavy Monday or Friday leave usage, zero leave balance, excessive unscheduled LWOP)?
>
> Did agency officials counsel the employee about the leave problem? Does the agency have established procedures for requesting or documenting leave? If so, did the employee follow these procedures?
>
> Is the employee currently on leave restriction? If not, should the employee now be placed on leave restriction?
>
> Have agency officials documented all instances of AWOL or other leave abuse?
>
> If the employee has been away from the worksite, what attempts, if any, have been made to contact the employee? Were these attempts documented?
>
> Did the employee abandon the job (i.e., leave the job without resigning and without any apparent intention of returning)?
>
> *Insubordination or Failure to Follow Instructions*:
>
> What is the function of the office?
>
> What was the instruction? Was it work-related? Was it clear?
>
> Was the instruction given in writing? If not, were there witnesses when the instruction was given?
>
> Was the instruction mandatory or advisory in nature? Was the employee warned that failure to follow the instruction could lead to disciplinary action?

> What was the employee's response to the instruction?
>
> Did the employee subsequently do the work? When? Was it performed adequately? What impact, if any, did this delay have on the office?
>
> Is there circumstantial or other evidence that the employee's failure to follow the instruction was intentional (in which case a charge of insubordination may be appropriate)?
>
> Is there reason to believe the employee will claim that it was impossible to comply with the instruction?[28]

These questions, which might appear intuitive to an experienced agency representative, are often overlooked by the inexperienced.

Mr. Ashner's questions are very helpful to the agency because the answers to them can easily affect the outcome of the case. For example, it is important in pursuing an attendance-related offense to inquire into whether the employee was under leave restrictions. An employee who has been placed on a leave restriction letter can be charged with AWOL based upon a failure to provide medical documentation in the time frame required by the leave restriction letter,[29] while, in the absence of a leave-restriction letter, an employee can defeat an AWOL charge by presenting administratively acceptable medical evidence for the first time before the MSPB.[30]

As a second example, in considering whether to charge an employee with either insubordination or failure to follow instructions, it is vital for the labor counselor to ascertain if the work was ever actually completed. If an employee given an order or instruction belatedly does the work, the Board may find a charge of failure to follow instructions to be unproved if the employee had not been given a deadline.[31]

In sum, *Representing the Agency before the Merit Systems Protection Board* is an invaluable resource to the new labor counselor and a useful

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28. ASHNER, *supra* note 1, at 29-30.

29. Flory v. Federal Aviation Administration, 17 M.S.P.R. 395, 399 (1983); Morris v. Department of the Air Force, 30 M.S.P.R. 343, 345-46 (1986).

30. Cantu v. Department of the Navy, 24 M.S.P.R. 601, 603 (1984); Morgan v. United States Postal Serv., 48 M.S.P.R. 607, 610-11 (1991).

31. Hamilton v. United States Postal Serv., 71 M.S.P.R. 547, 557 (1996).

primer for the experienced representative. For typical cases, carefully following the guidance contained in this book will eliminate many of the most common mistakes made by agency representatives. This strength is perhaps also the greatest limitation of the book because a great many cases are not typical, and an effective labor attorney must be able to recognize them. Therefore, Mr. Ashner's book must be used with care. It should only be the starting point for research, but never the end point.

If I had one major disappointment with this book, it is that it is written solely for agency representatives and from an agency perspective. This is not to say that an appellant's representative would be wasting his time to read this work, but the appellant's bar as well as the union officers who represent appellants could also benefit greatly from a handbook of this type tailored to their needs.

Either Mr. Ashner should expand his book to include guidance for appellant's representatives in his next edition, or, in the alternative, write a companion volume to assist appellants and their counsel. There is a need for such a book since, except for the small segment of the private bar that specializes in MSPB practice, most attorneys have little or no familiarity with the Board, and most union officers who represent appellants have far fewer training opportunities in MSPB practice than their agency representative counterparts.

OBEYING ORDERS:

ATROCITY, MILITARY DISCIPLINE AND THE LAW OF WAR[1]

REVIEWED BY MAJOR WALTER M. HUDSON[2]

I. Introduction

A middle-echelon officer, a major on a staff perhaps, is ordered to "transmit commands from headquarters to his subordinates requiring them to assemble prisoners of war for rail departure at a particular time or place." If it turns out that these prisoners are to be shipped to a factory where they will manufacture armaments, that would be a violation of the law of war. The person who gave the order to that middle-echelon officer would likely be guilty of a war crime. But what about that major, the one who transmitted the commands? Would he also be guilty of a law of war violation?

There are two possible outcomes under existing defenses. Under the so-called "manifest illegality" rule, if the major was ignorant of the ultimate destination and purpose, his ignorance would excuse him of any culpability because the order was not illegal on its face. Under the so-called "reasonableness" standard, even if the order was not illegal on its face, he could still be held responsible if he should have known that the ultimate destinations for those prisoners were forced labor camps.

This is a scenario Mark Osiel posits in his book *Obeying Orders*. Osiel argues for the acceptance in many, if not all modern militaries, of the latter "reasonableness" standard, as opposed to the more traditional "manifest illegality" rule. In coming to this conclusion, he has written an important, timely, and provocative book.

What makes Osiel's book so impressive is that it weaves together information from various disciplines. He explores concepts in criminal and international law. Moral philosophers–from Aristotle to Alasdair

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1. MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE AND THE LAW OF WAR (1999); 310 pages, $34.95 (hardcover).

2. Instructor, Criminal Law Department, The Judge Advocate General's School, Charlottesville, Virginia.

MacIntyre–provide rich insights that are complemented by equally provocative insights from military sociologists and psychologists. Compared to many so-called "post modern" works, filled with convoluted paths of prose, thickets of jargon, and patches of quotes from unreadable theorists, Osiel's book is generally lucid and straightforward.

What's more, Osiel has taken considerable time to talk, read, and listen to military commentators as well, to include active duty judge advocate general (JAG) officers and other army officers. Thus, Department of the Army lawyers such as Lieutenant Colonel Mark Martins and Hays Parks are frequently cited, and articles from military journals such as *Parameters* and *Military Review* noted and quoted.

Osiel, a law professor at the University of Iowa, thus displays little of the dismissiveness and smug elitism that is rampant throughout academia when dealing with the military. The divide between the modern academy and the military, at least in the United States, often appears to be insurmountable, with stereotypes abounding on both sides. This is unfortunate. After all, for something as serious as devising realistic, useful ways to prevent atrocity and war crime, no one should be excluded from the discussion. But, if informed civilians have a right to be heard, soldiers deserve not to be patronized.

Osiel's efforts to bridge this gap, as well as his scholarship, for the most part pays off. If he, on occasion, adopts what military practitioners may consider an "ivory tower" pose, he makes considerable efforts to understand both sides. If his scholarship does not always validate his overall argument for preferring the "reasonableness" standard over the "manifest illegality" rule, it provides the kind of information that raises questions and that causes both the professor and the practitioner to reflect deeply on this most serious of subjects.

II. "Manifest Illegality" vs. "Reasonbleness": Rules vs. Standards

In understanding the distinction between the "manifest illegality" and the reasonableness defense, the reader must first understand that in American military courts the latter defense *is* the current defense. As Rule for Court-Martial (R.C.M.) 916(d) states: "It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or *a person of ordinary sense and understanding would have known the orders to be unlawful*."[3] An American judge advo-

cate may ask, if indeed Osiel's position is already the U.S. military's current "formal" position, whether there is a reason to read this book.

There is a reason. To Osiel, the law on the "books" is a legal formalism that may not be observed in either the courtroom or the battlefield. While democracies such as the United States and Germany have the "reasonableness" standard, "even these rich democracies have yet to appreciate the full repercussions of this approach to war crime, for they do not seriously investigate, much less prosecute, unlawful obedience where its criminal nature would not be immediately manifest to all."[4] Thus, the United States military "has not sought to prosecute acts of obedience to criminal orders unless these were also manifestly illegal on their face."[5]

Osiel clearly understands–as many civilian commentators do not–that simply having (or changing) the law on the books is just the beginning of the solution. The election to investigate, to prosecute, and to render a verdict, all are influenced by many factors beyond the particular Rule for Court-Martial. What Osiel seeks is a kind of "acculturation" of this reasonableness standard within the military communities that will presumably abide by it. This is where Osiel again differs from many of his civilian colleagues, for he recognizes that this sort of acculturation is only possible within the "internal life of military organizations."[6] Only if the culture itself is informed of the standard (indeed, trains to the standard) will it have any meaning to that culture. Laws of war will be most effectively enforced and complied with not in the procedural rules, defenses, or threats of punishment that may occur after the battle is done, but rather in the training that a soldier receives–well before the soldier finds the possibility of atrocity before him.

The way to do this is to incorporate the "reasonableness" standard as a kind of military virtue, rather than rely on the bright line "manifest ille-

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3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(b) (1998) (emphasis added) [hereinafter MCM].

4. OSIEL, *supra* note 1, at 362.

5. *Id.* at 76. Furthermore, this reasonableness standard is used as exclusively as a defense–that is, it is used as an after-the-fact legal argument. When it comes to whether obeying an order is appropriate or not, American military law is clear: "Unless the order requires an obviously illegal act, or is obviously beyond the issuer's authority, the service member will obey the order . . . ." United States v. New, 50 M.J. 729, 739 (Army Ct. Crim. App. 1999). While this presumption to obey orders unless obviously illegal is not quite the same as the "manifest illegality" rule (which would allow as a complete defense the fact that the order was lawful on its face), the distinction may be difficult to see.

6. OSIEL, *supra* note 1, at 163.

gality" rule. At first blush, having such a bright line rule, particularly during the chaos of combat, seems especially beneficial. The "reasonableness" standard, on the other hand, is not as clearly defined, and is indeed defined primarily by its cultural context. Yet, this cultural context is exactly what Osiel depends upon in enforcing the standard:

> The highly chaotic nature of war, despite all efforts to rationalize and routinize it, ensures that professional warriors will always be governed by some form of "virtue ethics." The law should take this into account, governing soldiers by way of general standards that build upon virtues internal to the calling, allowing professionals themselves to play the primary part in defining these.[7]

This approach may raise some eyebrows. After all, the first inclination is to think that the military is based on strict rules, regimentation, and unthinking obedience. But anyone familiar with the military, and with such publications as Army *Field Manual 22-100*, will know that the "unthinking" type of obedience, known as "directing" leadership, is only one type of military leadership.[8] As Osiel points out, in the U.S. military, tremendous emphasis is constantly placed on decentralizing decision-making, allowing subordinates "on the scene" to make decisions. Osiel contends that there are sound reasons for this. One critical reason is the considerable sociological data that suggests that "[e]fficacy in combat now depends more on tactical imagination and loyalty to combat buddies than on immediate, unreflective adherence to the letter of superiors' orders, backed by discipline of formal punishment."[9]

The irony, as Osiel points out, is that the military, deeply cultured in its own norms and practices, is often far less rule-based than civilian society. In civilian society, laws are routinely determined to be "void for vagueness" precisely because they are not clear as to what sort of conduct

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7. *Id.* at 285.

8. *Field Manual 22-100* refers to three "leadership styles." The "directing" style is used when the leader "tells subordinates what he wants done, how he wants it done, where he wants it done, and when he wants it done and the supervises closely to ensure they follow his directions." The other two leadership styles are the "participating" style (involving the subordinates "in determining what to do and how to do it") and the "delegating" style (delegating both the "problem-solving and decision-making authority to a subordinate or to a group of subordinates"). U.S. DEP'T OF ARMY, FIELD MANUAL 22-100, MILITARY LEADERSHIP, app. B (31 July 1990).

9. OSIEL, *supra* note 1, at 7. Osiel explores this idea in more detail in Chapters 13-14 of his book.

they prohibit. In contrast, the military is replete with "standard" based laws. Articles 133 ("conduct unbecoming an officer and a gentleman") and 134 ("conduct prejudicial to good order and discipline") are two examples of actual laws that do not define specific conduct beforehand as prohibited, but rather rely on the prevalent and often unspoken standards in the military community to indicate to any reasonable soldier that particular conduct is unlawful.[10]

Osiel, follows moral philosopher Alasdair MacIntyre in constructing this line of argument.[11] He argues that ethical systems are effectively formed within communities that have shared senses of values and purpose. If such values are created within communities that have shared ethical values, real and meaningful reform cannot be imposed from "on high," as it were, in tinkering with rules or statutes, but from within the military culture itself. Furthermore, the military, as a deliberately "separated" community has been able to foster and to promote a set of values that are relatively stable. In contrast, in the civilian culture at large, there is a fragmented ethos, and an ever-widening (and competing) number of "values." In contemporary society, attempts at a coherent, consistent virtue ethic are thus doomed to failure.

Of course, this part of Osiel's book raises enough "food for thought" itself. What it implies is the necessity for the military to retain its complex web of social practices, distinct in many ways from the diffuse moral standards in contemporary liberal societies. That this is a profound argument for resisting "on high," top-driven "social" reforms currently debated for the military is obviously beyond the scope of Osiel's book. But, he raises serious, thought-provoking questions about the necessity to, at least, very

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10. Another example of such a "standard" based law is the offense of "dereliction in the performance of duties," a violation of Article 92 of the Uniform Code of Military Justice. In considering what a "duty" is, the explanatory text in the *Manual for Courts-Martial* states that "[a] duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service." MCM, *supra* note 3, Part IV, para. 16c.(3)(a).

11. Osiel expresses little sympathy for MacIntyre's actual philosophical project, which many academics view as suspiciously reactionary. OSIEL, *supra* note 1, at vii-viii. Indeed, MacIntyre has pretty much written off the modern liberal project and come to embrace Thomism and Catholicism. MacIntyre's best known book is *After Virtue* published in 1981. He has developed his ideas on virtue within communities principally in three other books. *See* WHOSE JUSTICE? WHICH RATIONALITY? (1988); THREE RIVAL VERSIONS OF MORAL ENQUIRY (1990); DEPENDENT RATIONAL ANIMALS (1999).

carefully examine potential serious changes in the network of military norms and practices.

The other important point that comes from this understanding of standards as opposed to "bright line" rules is that for such standards to be effectively "inculturated" they must be trained on and mastered. Realistic training scenarios must be worked out "designed to cultivate practical judgment in the field, particularly in morally hard cases."[12] Osiel points out "standard-based" practical reasoning is already occurring in current U.S. rules of engagement training–pointing to Lieutenant Colonel Mark Martins's "RAMP" concept as a prime example. According to the RAMP principle, the soldier is not given a "bright line" rule, but a set of factors to apply situationally, relying on both his training and common sense.[13]

This is where, in particular, JAG officers come in. Indeed, Osiel not only refers to JAG officers throughout the book, he devotes a chapter to them. Judge advocates are particularly important in the "acculturation" approach because they "can help the law play a more effective and less obtrusive part in preventing war crime than the conspicuous spectacles of *post facto* criminal prosecution (international or domestic), for all its admitted value."[14] Judge advocates should be in the forefront in creating training methods, especially simulated application of engagement rules.[15] Such rules should also "be closely assessed by empirically-oriented social scientists studying military organization."[16] Osiel obviously sees his standard as something worthy of experiment, and, given the expanded role

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12. OSIEL, *supra* note 1, at 260.

13. The "RAMP" concept devised by Lieutenant Colonel Martins employs the "real world" problem-solving method of addressing rules of engagement (ROE) questions and adopts a training strategy for ROE akin to methods used to train other soldier skills. Thus the acronym "RAMP" is also a memory aid (mnemonic) that stands for: "Return fire with aimed fire . . ."; "Anticipate attack . . ."; "Measure the amount of force that you use . . ."; and "Protect with deadly force only human life . . . ." *See* Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1 (1994).

14. OSIEL, *supra* note 1, at 363-64.

15. Indeed, the Osiel "reasonableness" standard is discussed and debated in classes taught on war crimes to JAG officers at The Judge Advocate General's School. E-mail Letter from Major Michael L. Smidt, Instructor, International and Operational Law Department, The Judge Advocate General's School (July 14, 1999) (on file with author).

16. OSIEL, *supra* note 1, at 364.

JAGs play in battlefield training exercises, this seems to be within the realm of possibility.

Furthermore, Osiel points out that JAGs are most effective when they are a real part of that internal community that they must nevertheless evaluate and even criticize. Thus he speaks of "seemingly trivial ways" that JAGs win trust of skeptical officers by keeping uniforms and appearance crisp and throwing in "a reference here and there to the von Schlieffen plan, for instance, or a double envelopment."[17] The "Hawkeye Pierce" type, in Osiel's view, is not simply a burr in the command's side. He is, in the long run, ineffectual. While this may appear common sense to most JAG officers, it is startling to see it come from an academic, where military norms and practices are routinely scorned as trivial and demeaning, or even crypto-fascist and murderous.

III. Some Scholarship Problems

Osiel has written a good book with a multidisciplinary approach. Of course the danger in such an approach, is that in covering a lot of ground, one can try to cover too much. Errors thus appear. Some are minor, as when he misidentifies military historian Gwynne Dyer as female.[18] Others indicate a kind of scholarly sleight of hand. For example, late in the book he notes how neither the United States nor Germany actually follow the "reasonableness" defense. But to support this assertion, his cite is not to an example from either country, but to the Israel Defense Forces' prosecutions (or lack thereof) following the Palestinian Intifada.[19]

Other errors reveal an unfamiliarity with military criminal law. For example, Osiel asserts that a soldier who has committed a war crime may state that he honestly believed that the order to commit the crime was either honest or reasonable, and that "[t]he defendant bears the evidentiary burden of proving this defense."[20] This is an incorrect statement of military law. In American military justice, R.C.M. 916(b) clearly states that the burden of proof when defenses are raised (except for lack of mental responsibility and mistake of fact as to age in a carnal knowledge prosecu-

17. *Id.* at 349.
18. *Id.* at 168, n.21.
19. *Id.* at 362, n.10.
20. *Id.* at 48.

tion) remains on the prosecution to prove "beyond a reasonable doubt that the defense did not exist."[21]

Osiel makes the same mistake later in the book when he states that, under the "reasonableness" standard, the accused "thus bears the burden of establishing that his error was honest and reasonable. The law's presumption no longer tilts the scales heavily in his favor. In other words, he must produce sufficient evidence to establish a reasonable doubt about the culpability of his error."[22] Osiel apparently confuses a production burden with a persuasion burden. Once some evidence raises the defense, the burden nevertheless remains, at least under the Uniform Code of Military Justice, upon the government to show that the accused knew or should have known the order to be unlawful.[23]

IV. The Perils of Overcomplexity

Another danger with covering so much material is that the information and methodologies taken from other disciplines sometimes fail to fit neatly into an author's purpose. Sometimes, indeed, such information and methodologies create unnecessary complications. This sort of straining and overcomplexity plagues much contemporary academic writing, and the law has not escaped various ham-fisted attempts to make an extralegal theory or premise fit some legal doctrine or idea.[24]

A good example of such overcomplexity is Osiel's applying analytical philosophy in "redescribing" criminal events.[25] For example, when describing how one could "redescribe" the acts of Lieutenant Calley and his men, one could say: If they were "intentionally shooting women and children" they would be guilty of murder; if they are "following superior orders unreasonably believed to be lawful" then they would be guilty of only negligent manslaughter. Each account "focuses the descriptive frame

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21. MCM, *supra* note 3, R.C.M. 916(b).

22. OSIEL, *supra* note 1, at 292.

23. *See* discussion, MCM, *supra* note 3, R.C.M. 916(b): ("A defense may be *raised* by evidence presented by the defense, the prosecution, or the court-martial."). The merest production of evidence by any side will likely satisfy the ""production" burden.

24. For an extended critique of a whole area of such legal scholarship, the so-called "law and literature" movement, see *Richard A. Posner, Law and Literature: A Misunderstood Relation*, published in 1988.

25. OSIEL, *supra* note 1, at 125-30.

very differently, highlighting certain facts while relegating others to legal irrelevance."[26]

How is this particularly helpful? Does Osiel mean to equate rhetorical flourishes by the prosecution and defense in their closing arguments with statements of law? They are not "law" but arguments, and as Osiel points out, can in fact both be "held" simultaneously. At least, under the military criminal law, voluntary or involuntary manslaughter are lesser included offenses of murder.[27] Just because Calley is unreasonably following orders does not exculpate him from further wrongdoing–he would still be committing murder. It is not necessarily an either/or proposition in this case.

Osiel sees such an analysis as a way to a solution to this potential "redescription" problem, however. Under the "reasonableness" defense, he wants to avoid competing "redescriptions" and have only one–whether the "defendant's professed error about the legality of his orders was reasonable, all things considered."[28] In other words, using the "reasonableness" standard "obviates the need for any authoritative description of the defendant's conduct as a necessary predicate to determining whether it is manifestly illegal."[29]

Again, it is unclear how and why this is helpful. Surely "manifest illegality" is subject to a multiplicity of "redescriptions" as well. Furthermore, one may ask that if a "reasonableness" standard will open the door to an endless variety of nonauthoritative "redescriptions" as to what constitutes "reasonableness," whether this is a good thing. Is not the military panel member going to say, "what would the typical, reasonable (soldier, commander, and the like) do here?" And without some kind of bright line rule, is he now more or less likely to go for the more rhetorically explosive, potentially less truthful, description?

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26. *Id.* at 126.

27. Involuntary manslaughter is a lesser-included offense to all murders under Article 118, UCMJ. Voluntary manslaughter is itself considered murder ("act inherently dangerous to others) under Article 118, and is lesser-included offense for other murders under Article 119. UCMJ art. 118 (1998).

28. OSIEL, *supra* note 1, at 136.

29. *Id.*

V. The Practical Problems

The possible confusion caused by Osiel's reference to other disciplines leads to the more practical question raised by his argument. Can such a "reasonableness" standard work? In Western militaries such as the United States and Germany, where education and training of soldiers are very high, reasonableness is the standard, at least on paper. The kind of mass atrocity that concerns Osiel, however, is more likely to occur in less developed militaries where such training and education are exceedingly low. Furthermore, these are the same nations where there is less likely to be an "incultured" value system that can create a kind of standard that will prevent atrocity.

Osiel seems to recognize this issue. As he points out, non-Western states will likely need to adhere to "bright line rules that minimize opportunities to present disobedience to orders as the exercise of situational judgment. . . . Where loyalties to the state are weak, public order insecure, and soldiers are poorly educated and unmotivated, strict, bright-line rules, backed by threat of severe sanction, remain essential."[30] The militaries that are most likely to commit widespread atrocity are precisely those states, many of which are undemocratic, and whose militaries are subject to little, if any, internal scrutiny.

This leaves the Western democracies. But even in the militaries of these countries, one can see why the "reasonableness" standard may be observed more in the breach than in observance. To put it bluntly, it burdens the soldier with doubt.

> [T]he soldier would no longer be expected to resolve any and all doubts about the legality of superior orders in favor of obeying them . . . . The very absence of such a line is well-calculated to stimulate deliberation, both within the mind of the individual soldier and between members of the combat group.[31]

This kind of passage might induce skepticism, if not downright hostility, from military professionals. Perhaps it conjures up images of soldiers stopping in the midst of some desperate engagement to ponder what Aristotle would do in such a circumstance. Osiel's book is important enough not to be sneered at, and, in fact, if "reasonableness" *is* our stan-

30. *Id.* at 269.
31. *Id.* at 288.

dard, then one can presume that we should train according to it. But a passage like that above raises obvious questions. How would such thinking affect the dynamic of such a combat group? Would it reduce its combat effectiveness? Would it thus make it more dangerous to be in? Could it, via the law of unintended consequences, actually create more atrocity by creating tension and dissension within the group? Might not the unit break down, split apart, turn into a kind of mob and thus do what Osiel wants it to avoid?[32] Here obviously, the only way to realistically find out is to compare in some sort of actual training scenarios. It is far too important a question not to "field test" before implementing.

Furthermore, should the reasonableness standard be applied across the board, to include the young soldier with little experience? There is a difference, all too often, between "professional warriors"–those who have given years to the military, who view it as a calling that they will devote their lives to, and ordinary soldiers. The latter, as this century has seen again and again, may be conscripts–or perhaps volunteers–with minimal training in even basic combat skills, let alone any training in applying practical reasoning to whether orders should be obeyed or not. Even in the most sophisticated militaries, in an era of budget cutting and over-extension, one may be hard pressed to see significant amounts of time devoted to practical reasoning on the battlefield for such soldiers.

Osiel himself suggests allowing for differing standards within the military structure: "The higher the level of education and motivation possessed by soldiers at a given level in the hierarchy, the more that military

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32. These possibilities were raised by the Army Court of Criminal Appeals in the case *United States v. Rockwood*, 48 M.J. 501 (Army Ct. Crim. App. 1998). Captain Rockwood, a counterintelligence officer with the 10th Mountain Division in Haiti, was tried and convicted of several offenses, among them, willfully disobeying a superior commissioned officer. Captain Rockwood, without authority and contrary to orders, conducted an "inspection" of the Haitian National Penitentiary for possible human rights abuses. In upholding his conviction, the Army Court stated:

> The success of any combat, peacekeeping, or humanitarian mission, as well as the personal safety of fellow service members, would be endangered if individual soldiers were permitted to act upon their own interpretation of public Presidential statements without specific orders. The effectiveness of military operations, and lives of a soldier's comrades, depend on precise and timely obedience to orders, especially in tactical environments.

Id. at 506-7.

law should regulate their activities by way of standards, rather than rigid rules . . . ."[33] Perhaps one solution is to hold certain officers and non-commissioned officers to a "reasonableness" standard and other less experienced and/or younger soldiers to the "manifestly illegal" rule. This puts the burden on those who are most likely to have had the opportunity to train for it, and relieves the junior soldier from the anxiety of having to ponder, with bullets possibly flying around him, on whether he should obey his squad leader's order to return fire or not. Indeed, in Osiel's prisoner deporting scenario, the major's "officer training in pertinent law and general knowledge among such officers regarding similar shipments in the recent past would help determine the reasonableness of his action, as would the availability of legal counsel and time available to seek advice."[34]

VI. Conclusion

In the concluding chapter of *Obeying Orders*, Osiel states: "For the law of due obedience, however, the challenge is to help the professional soldier acquire a deeper appreciation of the morally problematic features of his calling, features so apparent to the rest of us."[35] One winces at that last clause–"so apparent to the rest of us"–smacking as it does of a kind of presumed moral superiority, and thus betraying much of the earnest effort Osiel has put forth in the book to understand and reach out to the military culture. (Why try to alienate the audience for whom this book seeks to make a difference?) Osiel, however, squarely puts the challenge to both soldier and civilian. Obedience is a kind of necessary evil in the military. Without it, undoubtedly there would be military disaster. But sometimes with it, there can be moral disaster. What makes Osiel's book important, despite its flaws, are not simply the answers it provides, but the questions it raises and the data it explores. As a concerned and knowledgeable civilian scholar, he has contributed significant to the discussion. For that, we can be grateful.

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33. OSIEL, *supra* note 1, at 270.
34. *Id.* at 354.
35. *Id.* at 366.

IN THE HANDS OF PROVIDENCE[1]

REVIEWED BY MAJOR TIMOTHY C. MACDONNELL[2]

Reading *In the Hands of Providence* by Alice Rains Trulock is like eating a plain bagel. It is filling, it does not upset your stomach, and, although you are glad you read it, you are not quite satisfied. In support of this comment, this review first discusses the book's strengths and why it is worth reading. Next, this review explains where the author falters and why *In the Hands of Providence* is not fully satisfying.

In the Hands of Providence is worth reading, if for no other reason than its subject matter: Joshua Chamberlain. Chamberlain's life is more *compelling* than any novelist could create. His life is full of success, failure, and triumph of the human spirit. For readers with little or no knowledge of Chamberlain's life, *In the Hands of Providence* will leave them wondering how they had not heard more about Chamberlain before.

Most non-Civil War enthusiasts might know something about Chamberlain. This knowledge, however, will probably be limited to Chamberlain's conduct at the battle of Gettysburg. *In the Hands of Providence* will reveal to readers a man of stunning physical courage and integrity. Readers will gain a deeper respect and admiration for Chamberlain and for all those who fought in the Civil War. Readers will learn that Chamberlain went from lieutenant colonel to major general in three years with virtually no prior military training. They will learn that during the war Chamberlain suffered from heat stroke and malaria, had five horses shot out from under him, and was wounded at least six times. Finally, readers will learn about the challenges Chamberlain faced off the battlefield from stuttering as a child to the death of his own children. The value of gaining this knowledge is the greatest strength of the book.

Another strength of *In the Hands of Providence* is its balance. Too often history sees an individual for a brief moment, and that moment defines the individual's entire existence. Chamberlain was a hero. Bene-

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1. ALICE RAINS TRULOCK, IN THE HANDS OF PROVIDENCE (1992): 569 pages, $37.50 (hardcover).

2. United States Army. Written while assigned as a student, 47th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

dict Arnold was a traitor. Richard Nixon was a criminal. The author gives us a fuller look at Joshua Chamberlain's life. Trulock devotes over one third of her book to Chamberlain's life before and after the war. Of the 380 pages of text in *In the Hands of Providence*, the author devotes approximately 140 pages to Chamberlain's pre-war and post-war life.

Through reading Trulock's pre-war discussion of Chamberlain, readers gain an insight into Chamberlain's private life. They learn of his physically vigorous childhood growing up on a farm in Brewer, Maine. Readers learn of his mental discipline, which allowed him to overcoming a stuttering problem and to be the "first class orator" at his graduation from Bowdoin College. They learn of his deep religious convictions and his commitment to the Union. The author's thoroughness allows readers to understand the life experiences Chamberlain drew upon to prepare him for war.

In Chamberlain's case, it is especially important to understand his early life experiences. This understanding enables readers to comprehend his successful military career. Any student of history can easily appreciate how Robert E. Lee or Ulysses S. Grant were successful military commanders. Both attended West Point, and both were veterans of the Mexican-American War. Understanding Chamberlain's success is more challenging. Chamberlain was a lieutenant colonel in a new regiment with virtually no military training. He successfully commanded in combat at the battalion and brigade level. By understanding the discipline Chamberlain tempered in his early life, readers can understand his ability to succeed with so little training in combat. Had the author not discussed Chamberlain's pre-war life, readers might have thought her accounts of Chamberlain's successes were inflated.

In contrast to the background provided in the pre-war pages, the value in reading about Chamberlain's post-war life is that it gives us "the rest of the story." Chamberlain's life should not be depicted as hero, war survivor, and happy veteran. Omitting a detailed discussion of Chamberlain's life after the end of the war would diminish the sacrifices he made for our country. Trulock talks about Chamberlain's post-war political career and life as a college professor. More importantly, she discusses his marital problems, his depression, his medical problems due to war injuries and the images of the war which haunted his post-war years, and the death of those

closest to Chamberlain. How Chamberlain weathered these challenges deepens the reader's respect for him.

These are the reasons to read *In the Hands of Providence.* Why then is the bagel not fully satisfying? The answer comes from three main criticisms of *In the Hands of Providence.* First, too much time is spent discussing irrelevant information, while too little time is spent discussing major battles. Second, the author fails to adequately explain major battles. Finally, the author's historical objectivity waivers in her treatment of Chamberlain.

To illustrate, readers will probably not be interested in the exact command configuration of the Fifth Corps of the Army of the Potomac.[3] The author spends too much time describing what brigade was temporarily transferred to what Corps for this minor battle, or that major road march. Most readers will not care about this information. The book is a biography of Joshua Chamberlain and the vast majority of troop movements described by the author provide little or no insight into his character.

Although the author explains in painful detail the various reconfigurations of the Army of the Potomac and its Fifth Corps, there is a lack of detail about the major battles in Chamberlain's military career. For example, the battle of Gettysburg is a defining moment in Chamberlain's military career. Yet in the chapter titled "Gettysburg," there are only nineteen pages of text devoted to the actual battle; eight pages are devoted to pictures.[4] Chamberlain's performance at Gettysburg is extraordinary and deserves more discussion than is provided. The author devotes more text to Chamberlain's command of the Appomatox surrender ceremony at the end of the war than she does to the battle of Gettysburg. This failure to distinguish between important and unimportant military information is surprising given the overall balance of Trulock's book.

War is chaos but books about war should not be chaos. The descriptions of battles in *In the Hands of Providence* are extremely confusing. It is as though the authir is trying to describe battles all at once. At times the author begins describing one unit's position and situation, and then stops half way through and begins discussing another unit.[5] It is as though the

3. *Id.* at 176.
4. *Id.* at 122, 125, 134-138, 140.
5. *Id.* at 201-03.

author is trying to describe the battle exactly as it unfolded on multiple fronts.

Much of the confusion surrounding the major battles described in *In The Hands of Providence* would be removed by detailed battle maps. There are forty-six historical photos in this book and only ten battle maps. Several of the historical photos are of individuals who had little to do with Chamberlain's life, leaving readers wondering "what's his picture doing here?" Because the battles are so fast paced and variable, one map per battle is not enough.

The final criticism of *In the Hands of Providence* is that the author's objectivity may have waivered. Joshua Chamberlain's life was extraordinary. So extraordinary that there is no need to overstate his positive qualities or gloss over his weaknesses; however, that seems to be an issue. By not dealing with Chamberlain's frailties as directly and honestly as his strengths, the author risks undermining the readers' confidence in the quality of the work.

An example of this waning objectivity is Trulock's treatment of the "drill rebellion."[6] In 1871 Chamberlain became the president of Bowdoin College, the same school he attended as an undergraduate and had taught at before the war. One of the many reforms Chamberlain instituted as president at Bowdoin was to include mandatory military science courses.

By 1871, Bowdoin required the student body to drill and take courses in the military sciences. Shortly after instituting this requirement, the entire student body signed a petition refusing to drill. Chamberlain responded by suspending the entire student body for ten days. After suspending the students, Chamberlain sent a letter to the parents of every student threatening expulsion if the students did not drill. In the end, all but three students returned to the school and drilled. Newspapers throughout New England reported the incident. The college formed a committee to investigate the incident and found Chamberlain's reaction to the crisis was inappropriate. The author does not seem to share this conclusion. She quotes one of the students who was involved in the incident as saying "of course we were wrong, and we all went back and submitted to the rule of the college."[7] Her only comment is: "The habit of command Chamberlain

6. *Id.* at 345.
7. *Id.* at 347.

had acquired in the army may have emerged strongly in this crisis contributing to [the committee's] observations of his performance."[8]

Chamberlain's behavior in this incident is especially ironic because he was suspended from Bowdoin as an undergraduate. Chamberlain's suspension was due to his involvement in a drunken frolic with some fellow students. Although Chamberlain had not been drinking during this incident, he was present and admitted to his presence when asked by the college president. When the president asked Chamberlain who else was involved, he refused to tell him. Chamberlain was suspended for ten days (the punishment was never carried out). Chamberlain felt unjustly suspend because his refusal to tell the president who his co-actors were was based on scruples. The author points to Chamberlain's suspension as evidence of his strong character and honor.

Trulock makes no mention of the irony of Chamberlain suspending all the student body of the same college from which he was suspended as an undergraduate. She seems to not see how hypocritical Chamberlain appears to have been in this incident. Chamberlain thought it was a matter of honor to protect his delinquent classmates as an undergraduate, but he fails to see the issues of honor presented by the student body of Bowdoin. Chamberlain fails to see how the students might consider it a matter of honor to oppose compulsory military training as part of their college education.

Chamberlain's reaction was to threaten and expel anyone who did not yield to his will. His actions in the "drill rebellion" seem extreme. The author's failure to address Chamberlain's lapse in judgment in the "drill rebellion" may cause readers to wonder if the author is viewing Chamberlain critically enough.

Shortcomings aside, *In the Hands of Providence* is well worth reading. The author brings Chamberlain's whole life to light and shows how his courage off the battlefield is, in some ways, just as amazing as his courage on the battlefield. Joshua Chamberlain's life was amazing. His courage and honor are an inspiration to soldiers and civilians alike. Knowing more about Chamberlain makes reading this book worth while.

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8. *Id.* at 347.

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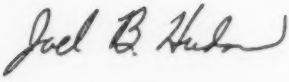

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